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No. _____

In the Supreme Court of the United States

CONRAIL C/O TRANSPORTATION DISPLAYS, INC.,
Petitioner,

v.

SOCIETY CREATED TO REDUCE URBAN BLIGHT (SCRUB), THE CENTER CITY RESIDENTS ASSOCIATION, MARY CRAWLEY TRACY, PHILADELPHIA COUNCILWOMAN ANNA VERNA AND PHILADELPHIA COUNCILMAN DAVID COHEN
AND
THE ZONING BOARD OF ADJUSTMENT OF THE CITY OF PHILADELPHIA AND THE CITY OF PHILADELPHIA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is the enforcement of a zoning classification that is erroneous on its face a violation of the due process and takings clauses of the United States Constitution?

2. Under the due process and takings clauses of the United States Constitution, should the burden for obtaining a dimensional variance be different from and lower than the burden for obtaining a use variance?

PARTIES AND RULE 29.6 STATEMENT

Petitioners are Conrail, a railroad and the fee owner of the subject property, and Transportation Displays, Inc., a commercial outdoor advertising company. Norfolk Southern Corporation and CSX Corporation are publicly traded companies, and each of them indirectly owns more than 10% of Conrail. Transportation Displays, Inc. is a division of Infinity Broadcasting, Corporation, which is largely owned by Viacom, Inc., a publicly traded company.

Respondents are the following civic groups, taxpayers and elected officials: the Society Created to Reduce Urban Blight (SCRUB), the Center City Residents Association, Mary Crawley Tracy, Philadelphia Councilwoman Anna Verna and Philadelphia Councilman David Cohen. When Respondents appealed the decision of the Zoning Board of Adjustment of the City of Philadelphia granting a variance to Petitioners, the Zoning Board and the City of Philadelphia became parties of record in the proceedings below.

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The April 26, 2001 decision of the Commonwealth Court of Pennsylvania, No. 1523 C.D. 2000, is published at 772 A.2d 1040 (2001) and is reproduced in Appendix C at 5a-14a.

The Order of the Court of Common Pleas for Philadelphia County, Pennsylvania, dated May 26, 2000, July Term, 1999, Nos. 3700, 3705, 3707 and 3712, and its Opinion dated September 5, 2000 are not published, and are reproduced in Appendix D at 15a-26a.

The Findings of Fact and Conclusions of Law of the Zoning Board of Adjustment of the City of Philadelphia, Pennsylvania, dated July 6, 1999, Nos. 99-407, 99-408, 99-409 and 99-410 are not published and are reproduced in Appendix E at 27a-104a.

STATEMENT OF JURISDICTION

The decision of the Commonwealth Court of Pennsylvania was entered on April 26, 2001. The order of the Pennsylvania Supreme Court denying allocatur was entered on November 20, 2001. The Pennsylvania Supreme Court denied reconsideration by order dated January 28,

2003. This petition is filed within 90 days of January 28, 2003. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

No notification is required under Rule 29.4(b), because this case draws into question the constitutionality of a zoning ordinance of the City of Philadelphia rather than a statute of the Commonwealth of Pennsylvania. The City of Philadelphia was a named party in the proceedings below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments of the United States Constitution are reproduced in Appendix F at 105a-106a. Sections 1 and 10 of Article I of the Pennsylvania Constitution are reproduced in the Appendix at 107a-108a.

Sections 14-701, 14-1604, and 14-1802 of the Philadelphia Zoning Code are reproduced in the Appendix at 109a-126a.

STATEMENT OF THE CASE

Conrail and Transportation Displays, Inc. (collectively "Conrail") wish to erect outdoor advertising signs on a property in South Philadelphia, located west of South Broad Street and between the Philadelphia Naval Yard to the south and Interstate 95 ("I-95") and Franklin D. Roosevelt Park to the north (the "Property"). The Property measures approximately 2,700 feet east to west and approximately 55 feet north to south. Its northern boundary is located from 40 to 70 feet south of the southern side of I-95, which is elevated at this location. Although two active rail lines occupy part of

the Property, the remainder of the Property is not used and cannot be used if current zoning restrictions are enforced.

The Property is zoned "Recreational," a classification that prohibits outdoor advertising signs. The classification is facially invalid, because, by its own terms, it only applies to publicly owned land devoted to park and/or recreational uses. The subject Property is owned in fee simple by Conrail and is not suitable for park or recreational uses. Because the zoning classification cannot constitutionally be enforced, a variance should be granted or the Property should be deemed unzoned.

Because of the Property's proximity to I-95 and because of the elevation of I-95, it is impossible to place outdoor advertising signs directed to I-95 on the Property without a dimensional variance from Philadelphia's special sign controls. The proposed signs were designed to comply as much as possible with the sign controls.

The courts below acknowledged that the "Recreational" classification was facially invalid, but denied on the ground that invalid zoning was not an "unnecessary hardship" and did not justify a use variance from the "Recreational" classification. The courts so held, despite the fact that the enforcement of the invalid zoning classification could not be rationally related to any governmental interest. The courts below also denied a dimensional variance from Philadelphia's special sign controls, applying a legal standard that was arguably more onerous than the standard for use variances. In every state that distinguishes between dimensional variances and use variances, the burden for obtaining dimensional variances is lower than for use variances. On both counts, Conrail was deprived of valuable property rights without due process of law.

Factual and Procedural Background

On March 26, 1999, Conrail applied to the Philadelphia Department of Licenses and Inspections ("L&I") for a permit to erect four free-standing, double-faced, "V" shaped, non-accessory outdoor advertising signs, each measuring 14 feet in height by 48 feet in length. The proposed signs would be oriented to vehicles traveling on I-95, with the apex of the "V" pointed towards I-95 and the faces of the signs almost perpendicular to I-95. Three of the proposed signs would be within 660 feet of an ingress or egress ramp to or from I-95, and all four signs would be within 660 feet of FDR Park.

Directly west of FDR Park is the Philadelphia Solid Waste Transfer Station and a large petroleum tank farm. Directly east are Broad Street, which runs north-south, and the First Union Sports Center and accessory parking lots. The land under the elevated I-95 roadway belongs to the City; people use it for parking and skateboarding. The City owns another parcel of land directly south of the Property, which is used not for recreational purposes. It appears abandoned, and people use it as an open air parking lot. The next parcel to the south is the former Naval Yard.

L&I refused to issue the sign permits, on the ground that outdoor advertising signs are not permitted within a Recreational District under §14-701 of the Philadelphia Zoning Code, and because the proposed signs did not comply with the special sign controls in §14-1604. The special sign controls, inter alia, prohibit outdoor advertising signs from: (a) being erected unless signs of equal size are removed; (b) being located within 660 feet of an ingress or egress ramp of the Delaware Expressway (a/k/a "I-95"); and (c) being located within 660 feet of a park under the jurisdiction of the

Fairmount Park Commission or the Department of Recreation.

Conrail timely appealed to the Zoning Board of Adjustment of the City of Philadelphia (the "Zoning Board"), which held a public hearing on May 12, 1999. At that hearing, Conrail raised a substantive challenge to the classification of its Property as "Recreational," and argued that the "Recreational" classification was invalid on the face of §14-701 of the Philadelphia Zoning Code and amounted to an improper regulatory taking. (N.T. May 12, 1999 Zoning Board Hearing at 88-89, 25-26, 9-10, 11-12, 12-13, 23-24, 27,62, 63; App. at 127a-134a).

By Notice of Decision dated July 6, 1999, the Zoning Board granted Conrail a use variance from the Recreational Zoning classification and a dimensional variance from the special sign controls. The Zoning Board filed its supporting Findings of Fact and Conclusions of Law on November 12, 1999. (App. at 27a-104a).

In its Findings of Fact and Conclusions of Law, the Zoning Board found that the Property was improperly classified as a Recreational District; that the improper classification created an unnecessary hardship; that the hardship was not self-imposed; that the proposed signs would not negatively affect public health, safety or welfare; and that the requested variance was the minimum needed to afford relief. (App. at 41a-43a, 61a-63a, 80a-82a, and 99a-102a).

The Society Created to Reduce Urban Blight, the Friends of FDR Park, the Center City Residents Association, Mary Cawley Tracy, Councilwoman Anna Verna, and Councilman David Cohen (collectively "SCRUB") timely appealed the Zoning Board's decision to the Philadelphia

Court of Common Pleas. The Common Pleas Court reviewed the Zoning Board's decision on the record created before the Zoning Board. Conrail again argued that the "Recreational" classification was invalid on the face of Section 14-701 and in derogation of Conrail's constitutional rights. (N.T. January 24, 2000 Common Pleas Court Hearing at 41-42, 13-14, 23-24; App. at 134a-138a). Conrail also argued that, with respect to the requirements of §14-1604, it was entitled to have its proposal evaluated under the legal standard for a dimensional variance as set forth in Hertzberg v. Zoning Board of Adjustment of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998), rather than the standard for a use variance. (N.T. January 24, 2000 Common Pleas Court Hearing at 34, 36-37, 47- 48; App. at 139a-142a). Following oral argument and briefs, the Common Pleas Court reversed the Zoning Board's grant of a variance by order dated May 26, 2000. (App. at 15a).

Conrail timely appealed to the Commonwealth Court on June 23, 2000. The Common Pleas Court filed an opinion in support of its order on September 5, 2000. In its opinion, the Court of Common Pleas agreed that the Property was incorrectly zoned under §14-701:

> This Court does not dispute that the property was incorrectly zoned. Clearly a piece of land such as the one concerned in this matter, which has functional and active railroad tracks, does not fit under the criteria for land which is to receive "recreational" zoning under the City of Philadelphia Zoning Code § 14-701(1).

(App. at 24a). Nevertheless, the Common Pleas Court overruled the variance from the requirements of §14-1604, on

the ground that Conrail was already using the Property for the railroad business.

On appeal to the Commonwealth Court, Conrail again argued that the "Recreational" zoning classification was a nullity and urged the application of the standard for a dimensional variance, as opposed to the higher standard for a use variance. (Petitioner's Brief before the Commonwealth Court at 4; App. at 142a-144a and 278a-279a). Conrail also argued that enforcing the invalid "Recreational" classification was arbitrary and unreasonable, in violation of Conrail's constitutionally protected property rights. (Petitioner's Brief before the Commonwealth Court at 20-21; App. at 144a-146a and 297a-300a).

By order and opinion dated April 26, 2001, the Commonwealth Court denied Conrail's appeal and affirmed the holdings of the Common Pleas Court. (App. at 5a-14a). The Commonwealth Court did not disagree that the classification of the Property was erroneous, but held that Conrail should have sought a "curative" zoning amendment.[1]

[1] Pennsylvania's Municipalities Planning Code provides for curative zoning amendments, 53 P.S. §10609.1, and further provides that the denial of a curative amendment is reviewable by the courts. Board of Commissioners of Ross Township v. Harsch, 467 A.2d 1183 (Pa Commw. 1983). Although the courts cannot order the adoption of a curative amendment, they can grant variances if they determine that the zoning ordinance unlawfully restricts a proposed use. Id. at 1186-1187; cf. Kaufman and Broad, Inc. v. Board of Supervisors of West Whiteland Township, 340 A.2d 909 (Pa.Commw. 1975). However, the Municipalities Planning Code only applies to cities and counties of Classes 2 through 8 (53 P.S. 10107, definitions of "City" and "County"). It does not apply to Philadelphia, which is a city and a county of the First Class. The Philadelphia Zoning Code does not contain any

The Commonwealth Court also held that the invalid "Recreational" classification did not create an unnecessary hardship, because the erroneous classification was not a unique physical condition of the Property. Next, the Commonwealth Court found that the variances required from Philadelphia's special sign controls were not dimensional. However, even if the variances were dimensional, the Commonwealth Court held that Conrail was not entitled to a dimensional variance unless it could show not only an unnecessary hardship arising from unique physical circumstances of the Property but also an inability to use the property for any other purpose, a standard arguably more onerous than the standard for use variances. (App. at 11a-12a).

Conrail timely petitioned the Pennsylvania Supreme Court for allowance of appeal. (App. at 304a). The Pennsylvania Supreme Court denied allocatur by Order dated November 20, 2001. (App. at 3a). Conrail timely sought reconsideration on December 4, 2001. (App. at 338a). The Pennsylvania Supreme Court did not deny reconsideration until January 28, 2003. (App. at 1a).

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comparable provision for curative amendments. Thus, the Commonwealth Court would leave Conrail without any judicial remedy for a substantively invalid zoning classification.

REASONS FOR GRANTING CERTIORARI

A. The Enforcement Of A Zoning Designation That Is Acknowledged By All To Be Erroneous Violates Conrail's Due Process Rights Under The Federal Constitution

This Court should grant certiorari because the enforcement of the facially invalid "Recreational" zoning classification violates Conrail's due process rights under the Federal Constitution.

A property owner has an inherent and indefeasible right to utilize his own land as he sees fit which the United States and Pennsylvania Constitutions protect against taking for public purposes without due process or without just compensation. Agins v. Tiburon, 447 U.S. 255, 260 (1980); Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 394 (1926); Pa. Northwestern Distributors, Inc. v. Zoning Hearing Board. of Township of Moon, 526 Pa. 186, 193, 584 A.2d 1372, 1375 (1991) (citing Pa. Const. Art. I, §§ 1 and 10); Girsch Appeal, 437 Pa. 237, 241 n. 3, 263 A.2d 395, 397 n. 3 (1970) (referring to 5th and 14th Amendments of the Federal Constitution). Given the fundamental rights at stake, courts will declare zoning regulations unconstitutional as violative of substantive due process where they "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Village of Euclid, 272 U.S. at 394. See Agins, 447 U.S. at 260 ("[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or [if it] denied an owner economically viable use of his land"). This is true, whether the zoning ordinance is a use regulation or a dimensional regulation. Colligan Zoning Case, 401 Pa. 125,

129, 162 A.2d 652, 653-54 (1960) (stating that a borough's interpretation of setback restrictions would be an unreasonable and thus unconstitutional interference of property rights where the restriction as applied to the specific property had no relation to safety, health or morals).[2]

1. The Classification of the Property as Recreational Is Facially Invalid

The Philadelphia Zoning Code provides that only a narrow class of properties may properly be designated as "Recreational":

> 14-701. Recreational Districts.
>
> (1) Parcels of public land under the jurisdiction of the City of Philadelphia Department of Recreation, Fairmount Park Commission, the Department of Forests and Waters of the Commonwealth of Pennsylvania,

[2] Courts in other jurisdictions have held that a property owner's due process rights are violated as a result of unreasonable and arbitrary zoning when land-use restrictions are "permitted to remain in force" despite the fact that there is no reason to believe that "the necessity of regulation in the public interest outweighs, qualitatively, the impact imposed on the individual property owner." Alsenas v. City of Brecksville, 29 Ohio App.2d 255, 260-61, 281 N.E.2d 21, 24-25 (Ohio Ct. App. 1972); Huebner v. Village of Carrolton, Ohio, 1980 Ohio App. LEXIS 10467, *7 (Ohio Ct. App. December 30, 1980); Buskey v. Town of Hanover, 133 N.H. 318, 323, 577 A.2d 406 410 (1990) ("[w]hen the restriction as applied to a particular piece of land is unnecessary to accomplish a legitimate public purpose or the gain to the public is slight but the harm to the citizen and his [or her] property is great, the exercise of police power becomes arbitrary and unreasonable").

> and the National Park Service of the United States Government which are devoted to park and/or recreational purposes may be designated on the zoning maps as Recreational.

Philadelphia Code, § 14-701(a)(1) (emphasis added).

It is undisputed that Conrail owns the Property in fee simple and that it cannot be considered public land. It is also undisputed that the Property is not devoted to park or recreational purposes and is not under the jurisdiction of a state, local, or federal parks department. Thus, the classification of the Property as "Recreational" is invalid on the face of the Zoning Code.

This is not merely a case of a classification that is overly restrictive for existing uses. By its own terms, the "Recreational" designation only applies to a narrow class of properties – public parks and public recreational areas under the jurisdiction of a state, local or federal parks department. This designation cannot apply to any privately owned land, regardless of its use. Thus, the erroneous "Recreational" classification is not saved by the doctrine of prior non-conforming use.

2. The Enforcement of a Facially Invalid Zoning Classification Is Unconstitutional

It is well settled that zoning regulations are unconstitutional if they "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Village of Euclid, Ohio, 272 U.S. at 394 (1926). Accord, DeBlasio v. Zoning Board for the Township of West Amwell, 53 F.3d

592, 601 (3d Cir. 1995) ("in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached"). Cf. Anstine v. Zoning Board of Adjustment of York Township, 411 Pa. 33, 40, 190 A.2d 712, 716 (1963) (it was arbitrary and unreasonable to deny a variance for a mobile home in a residential district that excluded trailers, where the proposal stated that the mobile home would be rendered structurally immobile by removing the undercarriage and bolting the structure to a concrete block foundation).

Likewise, a zoning restriction is unconstitutional if it does not advance a legitimate government interest. Agins, 447 U.S. at 260 (1980) ("[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests"); Colligan Zoning Case, 401 Pa. at 128-131, 162 A.2d at 653-54 (1960) (stating that a borough's interpretation of street front restrictions would be an unreasonable interference with property rights where the application of the restriction to the subject property had no relation to safety, health or morals).

In this case, the "Recreational" zoning classification of the Property is wholly inconsistent with the provisions and purpose of §14-701. As such, the classification is arbitrary and unreasonable and cannot constitutionally be enforced to deny a use that would be permitted if the Property were zoned in a reasonable manner, consistent with the ownership and use of the Property and the zoning of the surrounding properties.

The erroneous classification of private land as a "public park" was held to be arbitrary and unreasonable in New Products Corp. v. City of North Miami, 271 So.2d 24 (Fla. App. 1972). There, a commercial developer purchased real property from the City of North Miami. The property was classified for use as a public park, but the City agreed to reclassify the property as commercial if the purchaser filed an application for rezoning. New Products, supra, 271 So.2d at 25. When the City subsequently denied plaintiff's application to rezone the property, the purchaser brought an action for a declaratory judgment that the classification of the property as a "public park" was unconstitutional. Id. The Florida Court of Appeals struck down the "public park" zoning because it unconstitutionally restricted the property from being used for any purpose other than a public park:

> The present status of the subject parcel is untenable. It is now zoned for public park use only and is owned by a private party. This zoning classification is totally inconsistent with the ownership of the property. As such, it is the duty of the city to rezone the property in a manner consistent with its ownership. . . . To leave the subject property in its present classification completely deprives the owner of any beneficial use of his property by precluding all possible uses of same. This cannot be sanctioned by the courts.

New Products, supra, 271 So.2d at 25.

Similarly, the City of Philadelphia has no legitimate interest in classifying private property as "Recreational," contrary to the terms of §14-701, especially where, as here, the property is unsuitable for recreational use under any

reasonable interpretation of that term. Moreover, the Zoning Board held below that the proposed signs will not negatively impact the public. Thus, enforcing the "Recreational" zoning classification against the proposed signs has no substantial relation to public health, safety, morals or general welfare.

Because the classification of the Property as "Recreational" is arbitrary, unreasonable, and unrelated to any legitimate government interest, it is an unconstitutional deprivation of property and due process to enforce it against Conrail, so as to deprive Conrail of a use that would be permitted if the Property were zoned in a reasonable manner and would not negatively impact the public. In this case, the constitutional violation is aggravated by the fact that the Commonwealth Court denied Conrail's right to judicial relief on the ground that Conrail should have sought a curative zoning amendment. As explained in footnote 1 above, there is no provision for curative amendments in Philadelphia's zoning code, and the statutory provision for curative amendments in Pennsylvania's Municipalities Planning Code does not apply to Philadelphia. Thus, the Commonwealth Court would leave Conrail without any judicial remedy for a substantively invalid zoning classification.

Government action pursuant to a wrongful zoning designation or similar regulatory classification constitutes a "regulatory taking" in violation of the Federal and State Constitutions. See e.g., Penn Central Transportation Co. v. New York City, 438 U.S. 104, 127 (1978); Chesterfield Village, Inc. v. City of Chesterfield, No. ED78444,2001 Mo. App. LEXIS 787, *4 (Mo.Ct.App., May 9, 2001) (zoning classification was unreasonable and arbitrary and unconstitutional; municipality's refusal to rezone constituted a regulatory taking); San Remo Hotel L.P. v. City and County of San Francisco, 83 Cal. App. 4th 239, 255, 100

Cal.Rptr.2d 1, 33-34 (Cal.Ct.App. 2000) (hotel stated takings claim where City had erroneously classified hotel rooms as residential, thereby precluding use of the hotel by overnight guests); Harris v. Missouri Department of Conservation, 755 S.W.2d 726, 730-731 (1988) (state wrongly declared that private lake constituted state waters; the declaration amounted to a regulatory taking of the right to use the lake for commercial fishing).

In North Olmstead Land Holdings, Ltd. v. Planning Commission of the City of North Olmstead, No. 77658, 2001 Ohio App. LEXIS 5038 (Ohio Ct. App., November 8, 2001), the City rezoned plaintiff's property for office use only and refused repeated requests by the plaintiff to rezone the property. Id. at *1-*2. Plaintiff filed an action to declare that the City's actions in both improperly designating the Property for office use and in proscribing other uses amounted to an unconstitutional taking. Id. at *2, *6. The Court found that it was "beyond fair debate" that the City's zoning of the property was "arbitrary, unreasonable and not substantially related to the public health, safety, morals, or general welfare of the community." Id. at *6, *7. Further, the Court held that once the existing zoning was determined to be improper, the property should have been rezoned for a proper use "to avoid leaving the property in an unzoned classification." Id. at *9.

In Harris, the Missouri Court of Appeals held that a property owner had properly stated a claim for inverse condemnation where he alleged that the Missouri Department of Conservation erroneously classified a lake on the property as state waters, thereby precluding the owner from using the lake for commercial fishing, diminishing the value of the land, and eventually resulting in the sale of the land. Harris, 755 S.W.2d at 729-731.

In this case, there is no question that the City's designation of the Property as "Recreational" was erroneous on the face of §14-701 and that the erroneous zoning designation was "arbitrary, unreasonable, and not substantially related to the public health, safety, morals, or general welfare of the community." Thus, enforcing the invalid "Recreational" classification to preclude Conrail from erecting the proposed signs was an unconstitutional deprivation of property without due process of law.

3. Because The "Recreational" Classification is Invalid, The Signs Are a Permitted Use

Under Pennsylvania law, the remedy for a constitutionally invalid zoning ordinance is to approve the proposed use (subject to pre-existing regulations relating to land and structures), unless the proposed use would be injurious to the public health safety and welfare. Casey v. Zoning Hearing Board of Warwick Township, 459 Pa. 219, 230, 328 A.2d 464, 469 (1974); Adams Outdoor Advertising, Ltd. v. Hanover Township Zoning Hearing Board, 159 Pa. Commw. 372, 382-84, 633 A.2d 240, 245-46 (1993).[3]

[3] Cases from other states are in accord: Britton v. Chester, 134 N.H. 434, 444, 595 A.2d 492, 498 (N.H. 1991) ("Once an existing zoning ordinance is found invalid . . . , the court may provide relief in the form of a declaration that the plaintiff builder's proposed use is reasonable, and the municipality may not interfere with it"); Schwartz v. Flint, 426 Mich. 295, 325-331, 395 N.W.2d 678, 691-693 (Mich. 1986) (same); Mayfield-Dorsh, Inc. v. South Euclid, 68 Ohio St.2d 156, 159-160, 429 N.E.2d 159, 162 (Ohio 1981) (same); Union Oil Co. of California v. Worthington, 62 Ohio St. 2d 263, 266, 405 N.E.2d 277, 280 (Ohio 1980) (same); Richmond v. Randall, 215 Va. 506, 513, 211 S.E.2d 56, 61 (Va. 1975) (same); Sinclair Pipe Line Company v. Richton Park, 19 Ill. 2d

Alternatively, under Pennsylvania law, property that has been invalidly zoned may deemed "unzoned." See In re Appeal of Borough of Akron, 159 Pa. Commw. 420, 424, 633 A.2d 1244, 1246-47 (1993); Cameron v. Board of Adjustment of Greensburg, 281 A.2d 271, 272-73 (Pa. Commw. 1971). Cf. C&C Marine Maintenance Corporation v. Zoning Hearing Board of Georgetown Borough, 686 A.2d 896 (Pa. Commw. 1996).

There is no dispute that that the Property is privately-owned, and thus the classification of the Property as "Recreational" – a designation reserved for public parks -- is incorrect and invalid. It is also uncontested that the proposed signs are not "injurious to the public health, safety, welfare, and morals." Neither the Commonwealth Court nor the Court of Common Pleas concluded that the proposed signs would pose a threat to public health or safety. Thus, the proposed signs must be treated as a permitted use of Conrail's Property.

B. Denying a Dimensional Variance Based on the Standard for a Use Variance Violates Conrail's Due Process Rights Under The Federal Constitution

This Court should also grant certiorari because applying the standard for use variances to dimensional variances violates Conrail's due process rights under the Federal Constitution. The primary purpose of zoning is to regulate the use of land. Dimensional regulations are of secondary importance to the use of the property and serve a lesser public purpose than use regulations. Thus, as matter of constitutional law, dimensional variances should not be

370, 379, 167 N.E.2d 406, 411 (Ill. 1960) (same); City of Atlanta v. McLennan, 237 Ga. 25, 27, 226 S.E.2d 732, 734 (1976).

subject to the same high standard as use variances. Otherwise, the denial of a dimensional variance is not rationally related to the purpose of the dimensional regulations.

1. The Standard for Dimensional Variances Should Be Different From and Lower than the Standard for Use Variances

In Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998), the Pennsylvania Supreme Court stated that "when seeking a dimensional variance within a permitted use, the owner is asking only for a reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with the applicable regulations." Id., 554 Pa. at 257, 721 A.2d at 47. The Court explained that "grant of a dimensional variance is of lesser moment than the grant of a use variance, since the latter involves a proposal to use the property in a manner that is outside the zoning regulation." Id. The Court then concluded that the trial court applied the proper standard when it held that the applicant for a dimensional variance need only prove that "the zoning requirements work an unreasonable hardship in the owner's pursuit of a permitted use." Id.

Courts in other jurisdictions have held that dimensional variances are subject to a lesser standard of hardship than use variances. See e.g., Wisconsin v. Outagamie County Board of Adjustment, 244 Wis. 2d 613, 630-645, 628 N.W.2d 376, 382-390 (Wis. June 29, 2001) (expressly overruling prior Supreme Court decision requiring all dimensional variance applicants to demonstrate no reasonable use of the property); Gilani v. Board of Adjustment of New Castle County, Civil Action No. 00A-07-

009-JOH, 2001 Del. Super. LEXIS 309, *9 (Del. Super. July 27, 2001) ("area [also known as dimensional] variances are subject to less stringent standards than use variance"; "an applicant must show 'exceptional practical difficulties' in order for the [Zoning] Board to grant an area variance"); Alviani v. Dixon, 365 Md. 95, 120, 775 A.2d 1234, 1248 (Md. Ct. App. July 13, 2001) ("the standards applied to [dimensional] variances are more relaxed than those applied to use variances"); Go v. Sugarcreek Township Board of Zoning, C.A. Case No. 2000 CA 66, 2001 Ohio App. LEXIS 2460, *8 (Ohio Ct. App. June 1, 2001) ("an application for [dimensional] variance must establish only practical difficulties, not unnecessary hardship"); Gormally v. Shiff, 188 Misc. 2d 873, 874, 729 N.Y.S.2d 880, 880 (N.Y.Supr.Ct., 2001) (a dimensional variance will be granted where the benefit to the applicant if the variance is granted outweighs the detriment to the health, safety and welfare of the neighborhood or community).

In Outagamie, the Wisconsin Supreme Court revisited its prior decision in Wisconsin v. Kenosha County Board of Adjustment, 218 Wis. 2d 396, 577 N.W.2d 814 (1998), in which it held that both use and dimensional variances should be held to the same "unnecessary hardship" standard: "whether a reasonable use of the property is feasible without the variance." Outagamie, 244 Wis. 2d. at 634, 638 n 12, 628 N.W.2d at 384, 386 n. 12. The Wisconsin Supreme Court overruled Kenosha County, and explicitly rejected the "no reasonable use" standard with respect to dimensional variances. Id., 244 Wis. 2d at 633-34, 628 N.W.2d at 383-84. Instead, the Court stated that the proper standard for unnecessary hardship sufficient for the issuance of a dimensional variance was "whether compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner

from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome." Id., 244 Wis. 2d at 636-37, 628 N.W.2d at 385.

In rejecting the "no reasonable use" standard with respect to dimensional variances, the Court stated:

> The general rule throughout the United States recognized a distinction between the level of hardship required to justify area and use variance. "In most states, the courts will approve an area variance upon as lesser showing by the applicant than is requires to sustain a use variance."

Id., 244 Wis. 2d at 635-36, 628 N.W.2d at 385 (quoting 3 Kenneth H. Young, Anderson's American Law of Zoning § 20.48, at 580 (4th Ed. 1996)). The Court further held that requiring all area variance applicants to demonstrate that there is no reasonable use of the property without a variance "makes little sense," "runs a counter to the broader purposes of variance procedure," and raises constitutional concerns. Id., 244 Wis. 2d at 641, 643, 644, 628 N.W.2d at 387, 388, 389.

2. The Commonwealth Court Incorrectly Applied the Standard for Use Variances

The Commonwealth Court characterized the variance from §14-1604 as a "use" variance. (App. at 12a). This was an error for two reasons. First, in the Philadelphia Zoning Code, uses are governed by zoning classifications. Section 14-1604 is not a zoning classification. Rather, it is an overlay that imposes restrictions and conditions on the erection of

signs where signs are permitted by the applicable zoning classification. Second, the variance granted by the Zoning Board related solely to matters of measurement, such as total sign area and distance from other objects.

Even if the variance were dimensional, however, the Commonwealth Court held that a dimensional variance could not be granted unless there was unnecessary hardship arising from the unique physical circumstances of the Property. The Court found no unnecessary hardship, notwithstanding the fact that every point on the Property is within 660 feet of an ingress ramp onto I-95, and it is impossible to erect any sign on the Property without a variance from §14-1604. In addition, the Commonwealth Court found no economic hardship, because the Property was already being used profitably for the railroad business.

a. Section 14-1604 Is Not A Zoning Classification

Section 14-1604 of the Philadelphia Zoning Code does not determine the permissible uses of land. By its own terms, it "supplements" the provisions of the Zoning Code "with special restrictions regulating size, height, illumination, distances from residences, spacing, prohibition and conditions for obtaining permits." Phila. Zoning Code, §14-1604(2), App. at 112a.

Although Section 14-1604(9)(b) purports to prohibit signs within 660 feet of all ingress and/or egress ramps of the Delaware Expressway (I-95), it is a distance requirement for the erection of a sign, not a use regulation. This is because the language of Subsection 9(b) pertains to the placement or location of a sign within a certain distance from a specified structure and not to the use of a defined class of land. Thus,

if signs are a permitted use on certain land, Subsection 9(b) affects the location of the signs on that land. However, if the configuration of the property is such that compliance with the distance requirement is physically impossible, a reasonable variance should be granted.

b. The Variance from §14-1604 Granted by the Zoning Board Related Solely to Matters of Measurement

It is well settled that variances from setback, buffer area and other space and area requirements are dimensional variances rather than use variances. Pyzdrowski v. Pittsburgh Board of Adjustment, 437 Pa. 481, 489-490, 263 A.2d 426, 431 (1970); Damico v. Zoning Board of Adjustment, 164 Pa. Commw. 394, 643 A.2d 156, 162 (1994); Robert S. Ryan, *Pennsylvania Zoning Law and Practice*, §6.3.1 (1992) ("Examples of dimensional variances include set backs, lot width, building area and minimum lot areas.") Cf. Anderson, *American Law of Zoning*, 2d ed., §20.07 (dimensional variances involve matters such as setback lines, frontage requirements, height limitations, lot-size restrictions, density regulation, offstreet parking and yard requirements).

The Commonwealth Court suggested that the "take-down" requirement in §14-1604(10)(a) could not be characterized as dimensional. (App. at 12a). Nevertheless, the variance that the Zoning Board granted Conrail from this requirement was dimensional, because the variance related to sign area rather than sign removal.

Section 14-1604(10)(a) states that "For each outdoor advertising . . . erected in conformance with these provisions, an existing sign or signs encompassing an equal or greater

sign area shall be removed." Although Conrail did not propose to remove any signs in its proposal, Conrail's representative testified at trial that Conrail had removed 30 outdoor advertising signs since 1991 (when §14-1604 was enacted) for which it had not receive credit. (App. at 202a). Thus, the issue was not the removal of an existing sign, but the total sign area of the signs that Conrail had removed, which was unknown. The total sign area of the removed signs is a question of dimensions. The Zoning Board concluded that where Conrail had removed 30 outdoor advertising signs without receiving credit, it was reasonable to grant a variance from the requirement that Conrail prove that the total sign area of the removed signs was equal to or greater than the sign area of the proposed signs.

c. The Commonwealth Court Imposed a Higher Standard for a Dimensional Variance than for a Use Variance

In Hertzberg, the Pennsylvania Supreme Court indicated that an applicant for a dimensional variance need only prove that "the zoning requirements work an unreasonable hardship in the owner's pursuit of a permitted use." Hertzberg, supra, 554 Pa. at 257, 721 A.2d at 47. The court specifically held that it was not necessary to show that the property was valueless without a variance. Id., 554 Pa. at 259, 721 A.2d at 48. The court also held that it was not necessary to show that the property could not be used for any other permitted purpose. Id., 554 Pa. at 263, 721 A.2d at 50. Finally, the court held that a dimensional variance may be justified by a consideration of "multiple factors, including the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements, and the characteristics of the surrounding

neighborhood." Id. 554 Pa. at 264, 721 A.2d at 50. Thus, the standard for dimensional variances is not limited to physical conditions alone.

The Commonwealth Court did not apply the standard for dimensional variances. On the contrary, the Commonwealth Court held that even if the variances were dimensional, Conrail was not entitled to a dimensional variance unless it could show not only an unnecessary hardship arising from unique physical circumstances of the Property but also an inability to use the property for any other purpose. One way of reading the Commonwealth Court's holding is that there is no hardship in legal contemplation, as long there is another permitted use that does not require a variance. This is the same as saying a dimensional variance may only be granted if the property cannot be used for any other permitted purpose, a standard that, according to Hertzberg, is actually stricter than the standard for a use variance. Hertzberg, 554 Pa. at 258, 721 A.2d at 47.

Alternatively, the Commonwealth Court may have meant that, where a property is being actively used, it is not a hardship to be denied an additional use, even though the additional use is a permitted use. There is nothing in Hertzberg to suggest that unreasonable hardship in the pursuit of a permitted use is lacking where the use is additional to an existing, non-exclusive use. A permitted use is a constitutionally protected property right. E.g., A.A. Profiles, Inc. v. City of Fort Lauderdale, 253 F.3d 576, 582 (11th Cir. 2001) (City's actions in refusing to allow permitted use and in later re-zoning the property constituted a taking in violation of the Fourteenth Amendment). Unless the Zoning Code reasonably provides that a particular use shall be exclusive, permissible uses may be (and frequently are) combined. Dimensional restrictions on permitted uses must be reasonable

and must not wholly eliminate a permitted use unless it is reasonably necessary to protect the public health, safety or welfare. See Colligan, supra, 401 Pa. at 123-131, 162 A.2d at 653-54. In this case, the Zoning Board concluded, and the Courts below did not disagree, that the proposed signs pose no threat to public health and safety. (App. at 43a, 63a, 82a, and 101a).

The Commonwealth Court incorrectly evaluated Conrail's dimensional variance under the standard reserved for use variances. In so doing, the Commonwealth Court arbitrarily elevated an inherently less important type of regulation to the same level as use regulation the denial of a dimensional variance. As a result, the denial of Conrail's dimensional variance was not rationally related to the purpose of the dimensional regulations and violated Conrail's rights under the due process and takings clauses of the Federal Constitution.

CONCLUSION

For all the foregoing reasons, Petitioners Conrail c/o Transportation Displays, Inc. respectfully request that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED

021578 APR 28 2003

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

CONRAIL C/O TRANSPORTATION DISPLAYS, INC.,
Petitioner,

v.

SOCIETY CREATED TO REDUCE URBAN BLIGHT (SCRUB), THE CENTER CITY RESIDENTS ASSOCIATION, MARY CRAWLEY TRACY, PHILADELPHIA COUNCILWOMAN ANNA VERNA AND PHILADELPHIA COUNCILMAN DAVID COHEN
AND
THE ZONING BOARD OF ADJUSTMENT OF THE CITY OF PHILADELPHIA AND THE CITY OF PHILADELPHIA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 260 EAL 2001

[Filed January 28, 2003]

SOCIETY CREATED TO REDUCE URBAN BLIGHT (SCRUB), FRIENDS OF FDR PARK, ANNE C. VERNA, COUNCILMAN DAVID COHEN, MARY CRAWLEY TRACY, AND CENTER CITY RESIDENTS ASSOCIATION,

v.

ZONING BOARD OF ADJUSTMENT OF THE CITY OF PHILADELPHIA AND CITY OF PHILADELPHIA,

PETITION OF: CONRAIL c/o TRANSPORTATION DISPLAYS, Inc.
Petitioner

Petition for Reconsideration of the Denial of the Petition for Allowance of Appeal

ORDER

PER CURIAM

AND NOW, this 28th day of January 2003, the Petition for Reconsideration is DENIED.

Former Chief Justice Zappala did not participate in the consideration or decision of this matter.

Mr. Justice Eakin did not participate in the consideration or decision of this matter.

APPENDIX B

IN THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

No. 260 EAL 2001

[Filed November 20, 2001]

SOCIETY CREATED TO REDUCE URBAN BLIGHT(SCRUB), FRIENDS OF FDR PARK, ANNA C. VERNA, COUNCILMAN DAVID COHEN, MARY CRAWLEY TRACY, AND CENTER CITY RESIDENTS ASSOCIATION,	)
v.	)
ZONING BOARD OF ADJUSTMENT OF THE CITY OF PHILADELPHIA AND THE CITY OF PHILADELPHIA	)
PETITION OF: CONRAIL C/O/ TRANSPORTATION DISPLAYS, INC.,	)

Petition for Allowance of Appeal from the Order of the Commonwealth Court

ORDER

PER CURIAM

AND NOW, this 20th day of November, 2001, the Petition for Allowance of Appeal is DENIED.

APPENDIX C

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1523 C.D. 2000

[Filed April 26, 2001]

Society Created to Reduce Urban Blight (SCRUB), Friends of FDR Park, Anna C. Verna, Councilman David Cohen, Mary Crawley Tracy, and Center City Residents Association	)
v.	)
Zoning Board of Adjustment for the City of Philadelphia and City of Philadelphia;	)
Appeal of: Conrail c/o Transportation Displays, Inc.	)

Appealed From Nos. 3700, 3705, 3707 & 3712
July Term 1999
Common Pleas Court of the County of Philadelphia
Judge LEVIN

JUDGES:
BEFORE: HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JESS S. JIULIANTE, Senior Judge

OPINION BY JUDGE SMITH.

OPINION

Conrail c/o Transportation Displays, Inc. (Conrail) appeals from an order of the Court of Common Pleas of Philadelphia County which reversed an order of the Zoning Board of Adjustment of the City of Philadelphia (Board) granting Conrail four (4) variances to erect outdoor advertising signs on its property adjacent to Interstate Route I-95 in South Philadelphia (Property). Conrail poses three question for the Court's review: (1) whether the Recreational zoning classification is effectively a nullity since the Property does not meet the Philadelphia Zoning Code (Zoning Code) requirements to be zoned as such; (2) whether the variance requests from the Zoning Code's limitations on placement of outdoor advertising signs should be considered under the dimensional variance standards of *Hertzberg v. Zoning Board of Adjustment of Pittsburgh*, 554 Pa. 249, 721 A.2d 43 (Pa. 1998); and (3) whether substantial evidence supported the Board's findings that if the variances were denied Conrail would suffer unnecessary hardship and that the variances would not adversely affect public health, safety and welfare.

The Property is a narrow strip of land owned by Conrail adjacent to I-95 in South Philadelphia, which is approximately 55 feet wide and 2,700 feet long and is zoned Recreational. Three sets of railroad tracks span the length of the Property; Conrail currently uses the tracks and has no plans to discontinue their use. Parts of the Franklin Delano Roosevelt Park, a publicly owned park, are located to the north and south. In 1989 Conrail applied to the Philadelphia Department of Licenses & Inspections (Licenses &

Inspections) to erect four non-accessory, outdoor advertising signs on the Property. The signs which Conrail sought to erect would have been double-faced and "V" shaped, measuring 14 feet in height and 48 feet in width, and would have been designed to advertise to vehicles traveling on I-95. Licenses & Inspections refused the application because of the Recreational zoning. Conrail appealed to the Board but withdrew the appeal before a decision was reached.

In 1991 the Philadelphia City Council added Section 14-1604 to the Zoning Code. Section 14-1604 provides controls on outdoor advertising and non-accessory advertising which apply to all areas of Philadelphia. Among other limitations, the section prohibits outdoor advertising and non-accessory advertising signs within 500 feet of another outdoor advertising sign; prohibits more than two sign faces and more than one sign support structure on one lot; limits the total sign face area; prohibits outdoor advertising and non-accessory advertising within 660 feet of an ingress/egress ramp of I-95; prohibits outdoor advertising and non-accessory advertising within 660 feet of a public park; and requires the removal of an existing sign or signs of equal or greater sign area for each outdoor advertising and non-accessory sign erected.[1]

---

[1] Section 14-1604(2) of the Zoning Code prohibits outdoor advertising and non-accessory signs "within five hundred feet of any other outdoor advertising sign." Section 14-1604(7) provides that "[n]o more than two (2) sign faces or advertising messages shall be permitted on any one (1) lot; provided, that no more than one (1) sign support structure shall be permitted on any lot." Section 14-1604(5)(b) limits maximum sign area to 1,500 square feet for frontages along a street 60 feet wide or wider. Section 14-1604(9)(b) prohibits outdoor advertising and non-accessory

On March 26, 1999, Conrail filed four applications for use permits to erect four signs on the Property. Conrail again proposed to erect doubled-faced, "V" shaped, non-accessory, outdoor advertising signs. Each sign would have a total sign face area of 2,400 feet. All of the signs would be located within 660 feet of a public park, and three of the signs would be located within 660 feet of an access ramp of I-95. Furthermore, Conrail does not propose to remove any existing outdoor advertising sign of equal or greater area than the proposed signs. Licenses & Inspections refused the application because outdoor advertising signs are not permitted in Recreational districts and because the proposal does not comply with Section 14-1604 of the Zoning Code.

Conrail appealed to the Board, and after holding a public hearing the Board voted to grant Conrail a variance for each proposed outdoor advertising sign. The Board concluded that Conrail had established an unnecessary hardship on grounds that the Recreational zoning classification for the Property is improper because it does not meet the Zoning Code requirements to be zoned Recreational. The Zoning Code permits only parcels of public land under the jurisdiction of the Philadelphia Department of Recreation,

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advertising signs "within six hundred sixty feet of all ingress and/or egress ramps of the Delaware expressway (I-95)." Section 14-1604(9)(m) prohibits outdoor advertising and non-accessory advertising signs "[w]ithin six hundred sixty feet of any park, playground, recreation center, play lot or other recreational facility under the jurisdiction of the Department of Regulation." Section 14-1604(10) requires that an existing sign or signs of equal or greater sign area be removed for each outdoor advertising and non-accessory sign erected.

Fairmount Park Commission, Department of Forests and Waters of the Commonwealth of Pennsylvania or National Park Services of the United States to be zoned Recreational. The Board noted that Conrail could have erected the signs in 1989 without meeting the current requirements of Section 14-1604 if not for the improper zoning. The Board determined that the variances were the minimum necessary to afford relief and that the proposed signs would not have a negative impact on the public health, safety or welfare.

Appellees filed an appeal of the Board decision to the court of common pleas.[2] The court did not dispute the Board's conclusion that the Property was improperly zoned, but it noted, however, that Conrail was still required to comply with Section 14-1604. The court concluded that the Board's grant of the variances was improper and unsupported by substantial evidence because the Property has been and may continue to be productively used for the railroad business and therefore the evidence cannot establish the requisite unnecessary hardship. The court further rejected Conrail's arguments that the variances should be granted because they would have been allowed under Conrail's 1989 application and because they should be allowed as dimensional variances.[3]

---

[2] Conrail maintains that Appellees lack standing to challenge the variances issued but concedes that they have standing as taxpayers pursuant to the Court's decision in *Society Created to Reduce Urban Blight v. Zoning Board of Adjustment of Philadelphia*, 729 A.2d 117 (Pa. Cmwlth. 1999). The Court rejects Conrail's invitation to reconsider this recent precedent.

[3] The Court's review of the order of the court of common pleas is limited here to determining whether the Board committed

The standards for granting a variance in Philadelphia are well settled. The party seeking a variance bears the burden of proving that an unnecessary hardship will arise if the variance is not granted and that granting the variance will not be contrary to the public interest. *Valley View Civic Association v. Zoning Board of Adjustment*, 501 Pa. 550, 462 A.2d 637 (1983). The unnecessary hardship must arise from "the particular *physical* surrounding, shape, or topographical conditions of the specific structure or land involved." Section 14-1802(1)(a) of the Zoning Code (emphasis added). *See also* Section 910.2(a)(1) of the Pennsylvania Municipalities Planning Code (MPC)[4] (requiring that a zoning board find unnecessary hardship due to "physical circumstances or conditions" before granting a variance). Furthermore, the unnecessary hardship must be unique to the property rather than a hardship arising from the impact of zoning regulations on an entire district. *Valley View Civic Association.*

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an error of law or an abuse of discretion. *Gall v. Zoning Hearing Board of Upper Milford Township,* 723 A.2d 758 (Pa. Cmwlth. 1999).

[4] Act of July 31, 1968, P.L. 805, *as amended*, added by Section 89 of the Act of December 21, 1988, P.L. 1329, 53 P.S. § 10910.2(a)(1). The MPC does not apply to Philadelphia. *See, e.g., Society Created to Reduce Urban Blight v. Zoning Board of Adjustment of Philadelphia, 729 A.2d 117 (Pa. Cmwlth. 1999).* Nevertheless, the requirements set forth in Section 910.2(a) of the MPC are applicable to variances that are sought in Philadelphia pursuant to Section 14-1802 of the Zoning Code. *Carman v. Zoning Board of Adjustment of Philadelphia*, 638 A.2d 365 (Pa. Cmwlth. 1994).

Any impropriety in the Property's zoning classification is not a unique *physical* circumstance or condition, and therefore it cannot provide the unnecessary hardship required to grant a variance. A zoning board may not grant rezoning under the guise of a variance; to remedy improper zoning one must file a request for a curative amendment or a request for rezoning, which are fundamentally different procedures from a request for a variance. *Sposato v. Board of Adjustment of Radnor Township*, 440 Pa. 107, 270 A.2d 616 (1970); *Vanguard Cellular System, Inc. v. Zoning Hearing Board of Smithfield Township*, 130 Pa. Commw. 371, 568 A.2d 703 (Pa. Cmwlth. 1989). Even the need of an area for a complete rezoning classification does not permit the Board to grant a variance to a single property. *Hill District Project Area Committee, Inc. v. Zoning Board of Adjustment of Pittsburgh*, 162 Pa. Commw. 323, 638 A.2d 278 (Pa. Cmwlth. 1994). Conrail did not avail itself of the proper procedures to challenge the Property's zoning classification.

The only other hardship suggested by Conrail to support the variances is Conrail's contention that if it is not allowed to place the signs on its property it will not be able to follow its national advertising practice and will lose the income that the signs would otherwise generate. This argument is wholly frivolous. The law is well settled that a mere showing of economic hardship or that a property could be utilized more profitably is insufficient to support the grant of a variance. *Mucy v. Fallowfield Township Zoning Hearing Board of Washington County*, 147 Pa. Commw. 644, 609 A.2d 591 (Pa. Cmwlth. 1992). Accordingly, the Board's decision to grant the variances was plainly erroneous, and the court properly reversed the Board.

Conrail contends that because the Property is improperly zoned it is effectively unzoned and therefore Conrail should not have to comply with the requirements of a Recreational zoning classification. Conrail argues that it needs variances only from the requirements of Section 14-1604 in order to erect the signs and that those variances should be analyzed under the lesser standard for dimensional variances set forth in *Hertzberg*. This chain of reasoning fails for at least three distinct reasons. First, the Property is not unzoned. *Compare C & C Marine Maintenance Corp. v. Zoning Hearing Board of Georgetown Borough*, 686 A.2d 896 (Pa. Cmwlth. 1996). Rather the Board found that the existing zoning is improper. As previously mentioned, to correct improper zoning a landowner must request a curative amendment or rezoning. The Board may not short-circuit that process by granting a variance. *Sposato*; *Vanguard Cellular System*.

Second, the variances that Conrail requires from Section 14-1604 are not dimensional. Dimensional variances involve only a reasonable adjustment from open area and space requirements in order to develop a *permitted* use. *Hertzberg*. In contrast, Section 14-1604 prohibits the use of property for outdoor advertising and non-accessory advertising unless its requirements are met. The requirement, for instance, that an existing sign or signs of equal or greater sign area be removed for each outdoor advertising and non-accessory sign erected cannot be reasonably characterized as dimensional. Third, even under the more relaxed *Hertzberg* standards, which allow courts to consider multiple factors in determining if a dimensional variance is justified, the zoning board nonetheless must find some unnecessary hardship arising from the unique physical circumstances or conditions

of the lot before the zoning board may grant a variance. The record in this case is devoid of any evidence whatsoever to support a finding of unnecessary hardship. Accordingly, the order of the court of common pleas is affirmed.

/s/ _____
DORIS A. SMITH, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1523 C.D. 2000

[Filed April 26, 2001]

Society Created to Reduce Urban Blight (SCRUB), Friends of FDR Park, Anna C. Verna, Councilman David Cohen, Mary Crawley Tracy, and Center City Residents Association	)
v.	)
Zoning Board of Adjustment for the City of Philadelphia and City of Philadelphia;	)
Appeal of: Conrail c/o Transportation Displays, Inc.	)

ORDER

AND NOW, this 26th day of April, 2001, the order of the Court of Common Pleas of Philadelphia County is hereby affirmed.

/s/ _____
DORIS A. SMITH, Judge

APPENDIX D

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

Appeal of SCRUB from a decision of

the Zoning Board of Adjustment

in the matter of _____

Case No.	9907-3700	Consolidated for all purposes including appeal
	9907-3705	
	9907-3707	
	9907-3712	

ORDER OF COURT

AND NOW, this 26th day of May, 2000, it is hereby ORDERED that this appeal is GRANTED / ~~DENIED~~ and that the decision of the ZBA dated July 6, 1999 is ~~AFFIRMED~~ / REVERSED.

BY THE COURT:

/s/ _____
Hon. Stephen E. Levin

SERVICE:

X Counsel for Appellant served ~~in court~~ / by mail from ~~opponent~~ / clerk

X Counsel for Appellee served ~~in court~~ / by mail from ~~opponent~~ / clerk

___ Counsel for Intervenor served in court / by mail from opponent / clerk

___ Other:

Philadelphia Co. Common Pleas Opinion - 09/05/00

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION
NO. 9907-3700

COMMONWEALTH COURT
NO. 1523 C.D. 2000

[Filed September 5, 2000]

SOCIETY CREATED TO REDUCE URBAN BLIGHT, et al.	)
v.	)
ZONING BOARD OF ADJUSTMENT OF THE CITY OF PHILADELPHIA, et al.	)

LEVIN, J.

OPINION

This is an appeal from our Order dated May 26, 2000, reversing the decision by the Zoning Board of Adjustment dated July 6, 1999.

FACTS AND PROCEDURAL BACKGROUND

The Zoning Board of Adjustment made the relevant findings of fact at the hearing below. They are as follows:

1. This ease has a history. In September of 1989, Conrail ("Applicant"), by means of its legal representative, applied to the Department of Licenses and Inspections ("L&I") for use registration permits to allow the erection of four (4) outdoor advertising signs on the subject property. L&I determined that the proposed outdoor advertising signs were not a permitted use of a Recreational District, and accordingly issued several refusals to Applicant. (Application for Zoning and/or Use Registration Permit Nos. 024899, 024901, 024912, 024915; N.T. at 12)

2. Instead of appealing the refusals to the Zoning Board of Adjustment ("Zoning Board") Applicant sought to have the subject property's zoning classification changed. To this day, Applicant argues that the zoning for the subject property is improper and that it should be changed to a classification that would allow the erection of the proposed outdoor advertising signs as a matter of right. Despite Applicant's sentiment, the zoning classification for the property continues to be designated as a Recreational District. In addition, special regulations governing outdoor advertising signs have been added to the City of Philadelphia Zoning Code ("Zoning Code") since 1989 which place further restrictions on Applicant's proposed use of the subject property...

3. On March 26, 1999, Applicant, again by means of its legal representative, submitted to L&I four (4) separate applications for use registration permits (one for each of the proposed outdoor advertising signs) which would allow on the subject property the erection of four (4) double-faced, "V" shaped, non-accessory, outdoor advertising signs; Signs A, B, C and D. Each proposed sign face would measure 60' in width and 20' in height, and each proposed sign would have a total sign area of 2,400 square feet. Signs B, C, and D would be located within 660 feet of an ingress and/or egress ramp of I-95; Signs A, C and D would be located within 660 feet of a park and recreational facility under the jurisdiction of the City of Philadelphia Department of Recreation, and Signs B and C would be located with [sic] 660 feet of a park under the jurisdiction of the Fairmount Park Commission. In addition, Applicant did not propose to remove any existing outdoor advertising sign of equal or greater size that the proposed signs. (Application for Zoning and/or Use Registration Permit Nos. 990326004, 990326005, 990326006, 990326007; N.T. at 5).

4. L&I determined that Applicant's proposals for the subject property would not comply with the use regulations for a Recreational District and the outdoor advertising regulations as set forth in the Zoning Code at Sections 14-700 and 14-1604. Accordingly, on March 29, 1999, L&I issued eleven (11) use refusals on the permits for Signs A and B. On March 30, 1999, L&I issued six (6) refusals on the permit for sign D.

5. On April 9, 1999, Applicant filed four (4) separate appeals of the refusals to the Zoning Board. Subsequently, Applicant's appeals were consolidated, and a single public hearing was held before a quorum of the Zoning Board's members on May 12, 1999. (Petitions of Appeal to the Zoning Board; N.T. at 1).

6. On June 23, 1999, a majority of the Zoning Board's members voted to grant Applicant four (4) variances, one for each proposed outdoor advertising sign. (Notice of Decision).

7. The subject property is a narrow strip of land, measuring 2,700 feet in length and approximately 55 feet in width, with the length of the property lying in an east-to-west orientation. It is zoned Recreational. Applicant is the legal owner of the subject property having acquired the property from the Penn Central Transportation Company in March of 1979. (Application for Zoning and/or Use Registration Permit Nos. 990326004, 990326005, 990326006, 990326007, Applicant's Exhibit A-11; N.T. at 10; N.T. at 16; Deed, Applicant's Exhibit A- 1).

8. Three (3) sets of railroad tracks span the length of the subject property, dissecting it in half. The tracks are currently used by Applicant, and there are no future plans to discontinue their use. (N.T. at 28; N.T. at 43; N.T. at 62; Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9).

9. The subject property is located south of the I-95 (a/k/a Delaware Expressway) and to the west of Broad

Street. The surrounding area is comprised recreational and industrial properties. (Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9).

10. Located directly to the north of the subject property is the Franklin Delano Roosevelt Park ("FDR Park"), a large recreational area located in the southern region of the City of Philadelphia. The park is zoned recreational and is owned by the City of Philadelphia. FDR Park is under the jurisdiction of both the Fairmount Park Commission and the City of Philadelphia Department of Recreation. The park provides several recreational amenities, including a museum, tennis courts and numerous athletic fields. Also used by the visitants to FDR Park is a lake situated in the Middle of the park. (Application for Zoning and/or Use Registration Permit Nos. 990326004, 990326005, 990326006 99032600.7; N.T. at 20; N.T. at 29; N.T. at 31-33; N.T. at 57; (Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9).

11. Dissecting the southern portion of FDR Park is I-95. This major traffic artery runs parallel to the subject property. I-95 is elevated at this section and has both an egress ramp and an ingress ramp which allow automobiles to access the highway. FDR Park extends underneath I-95's road surface....

12. The subject property also cuts across the southern portion of FDR Park. This creates a "sandwiching" effect. The subject property is surrounded by portions

of FDR Park directly to the North and to the South. (N.T. at 18; N.T. at 43; (Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9).

13. Applicant proposes to erect on the subject property four (4), double faced, "V" shaped, non-accessory, outdoor advertising signs: Signs A, B, C, and D. The signs would be positioned in a horizontal row across the length of the property with Sign A located furthest to the west and Sign D located furthest to the east. The proposed distance between each sign would be approximately 587'. Each of the signs' faces would measure 14' in height and 48' in width. (Applicant has reduced the dimensions from its original proposal.) The proposed total sign area for each outdoor advertising sign would be [2 x (14 x 40)] 1, 120 square feet. (Application for Zoning and/or Use Registration Permit Nos. 990326004, 9903 26005, 990326006, 990326007, Applicant's Site Plans, Applicant's Exhibit A-6; N.T. at 20).

14. Applicant proposes to locate sign A within 500 feet of FDR Park. (Applicant's Site Plans, Applicant's Exhibit A-6).

15. Applicant proposes to locate sign B within 500 feet of FDR Park and within 500 feet of an ingress and an egress ramp to I-95. (Applicant's Site Plans, Applicant's Exhibit A-6).

16. Applicant proposes to locate sign C and sign D within 300 feet of an ingress and an egress ramp to I-95 and

within 500 Feet of FDR Park. (Applicant's Site Plans, Applicant's Exhibit A-6).

17. Applicant proposes not to remove from any of its properties located in the City of Philadelphia an existing sign of equal or greater size than the proposed outdoor advertising signs. (Application for Zoning and/or Use Registration Permit Nos. 990326004, 990326005, 990326006, 990326007).

DISCUSSION

Under Pennsylvania law, this Court's scope of review of agency decisions is limited to a determination of the following: whether the decision below is supported by substantial evidence, whether the agency committed an error of law or whether constitutional rights have been violated. 2 Pennsylvania. C.S.A. § 754(b). The Commonwealth Court has defined substantial evidence as "such evidence as a reasonable mind might accept as adequate to support the conclusion." *Civil Service Commission v. Poles*, 132 Pennsylvania. Cmwlth. 593, 598-99, 573 A.2d 1169, 1172 (1990), *appeal granted*, 527 Pennsylvania. 657, 593 A.2d 427 (1991), *appeal dismissed*, 530 Pennsylvania. 31,606 A.2d 1169 (1992). When examining an agency decision to determine whether it is supported by substantial evidence, this Court must examine the record while not weighing the evidence. Rather, the agency, as fact finder, has the prerogative to matte determinations of credibility and to decide the weight given to conflicting evidence. *Philadelphia Civil Service Commission v. Ross*, 141 Pennsylvania. Cmwlth. 1, 5-6, 595 A.2d 200, 202 (1989); *see Richter v. Civil Service Commission of Philadelphia*, 35 Pennsylvania.

Cmwlth.. 310, 315, 387 A.2d 131, 133 (1978) (holding that questions of credibility in Civil Service Commission hearings to be determined by Commission); *see also Poles*, 132 Pennsylvania. Cmwlth.. at 599, 573 A.2d at 1172 (holding that Court may not substitute its judgment for that of agency).

In the instant case, appellant argues that the Zoning Board was correct in allowing the signs to be erected. Appellant bases this argument on several theories, the first of which is that the property is improperly zoned and so falls under no zoning restrictions. This Court does not dispute that the property was incorrectly zoned. Clearly a piece of land such as the one concerned in this matter, which has functional and active railroad tracks, does not fit under the criteria for land which is to receive "recreational" zoning under the City of Philadelphia Zoning Code §14-701(1).[1] This does not, however, mean that the land is not subject to restrictions placed on all lands within the City of Philadelphia. The City of Philadelphia Zoning Code §14-1604(9)[2] does not carve out

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[1] § 14-701 (1) Parcels of public land under the jurisdiction of the City of Philadelphia Department of Recreation, Fairmount Park Commission, the Department of Forests and Waters of the Commonwealth of Pennsylvania, and the National Park Service of the United States Government which are devoted to park and/or recreational purposes may be designated on the zoning maps as Recreational.

[2] § 14-1604(9) Prohibited Areas. Outdoor advertising signs and non-accessory signs shall be prohibited:

(b) Within 660 feet of all ingress and/or egress ramps of the Delaware Expressway (I-95), from the Bucks County Line, and the Schuylkill Expressway (I-76), between the Montgomery County Line and the Walt Whitman Bridge; ....

exceptions to its application for lands with particular zoning designations or those without any particular zoning designations. In order for a sign to be placed in an area prohibited by the section a variance must be granted. Although the Zoning Board of Adjustment did grant the necessary variance, it did not do so properly as the standard for granting a variance was not met.[3] The property has been used without the signs for years. It is clear that the property may continue to be used for the railroad business without a variance. The Zoning Board of Adjustment's granting of a variance is not supported by substantial evidence.

Appellant's second theory is that the signs should have been allowed when they flied their initial applications to L&I in 1989 and, consequently, they should be allowed now. While appellant may be correct that the sign applications should have been granted in 1989, that was then and this is now. Since 1989 the zoning laws of Philadelphia have changed. The applications at issue in this case are not those filed in 1989. The applications at issue were filed after prohibited areas were designated by § 14-1604. As such, the prohibitions of § 14-1604 apply to the applications which are therefore properly denied.

(m) Within 660 feet on the outward edge of any park under the jurisdiction of the Fairmount Park Commission, the Commonwealth of Pennsylvania or the National Park Service...

[3] § 14-1802 The criteria for granting variances require, among other things, that enforcement of the Zoning Code would result in unnecessary hardship.

Thirdly, appellant suggests that the variance sought was a dimensional variance. Appellant mistakenly concludes that meeting the requirements of a dimensional variance will allow the property to be used in a way inconsistent with the prohibitions set forth in §14-1604(9). This contention, simply put, is incorrect. A dimensional variance would allow the appellant to construct a sign larger than that allowed in its zoning classification. It would not, however, allow for signs which were not either allowed on the property as zoned or allowed by use variance. As discussed above, violating the prohibitions set forth in §14-1604(9) is not allowed under any zoning classification and the property at issue does not suffer from the unnecessary hardship required for a variance.

CONCLUSION

For the foregoing reasons, we respectfully request the Commonwealth Court to affirm the rulings by the Court.

BY THE COURT:

/s/ _____
STEPHEN E. LEVIN, J.

Notified:
Carl S. Primavera, Esquire
Cheryl L. Gaston, Esquire
Samuel C. Stretton, Esquire
Robert M. Jaffee, Esquire

APPENDIX E

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

July Term, 1999

No. 003700

SOCIETY CREATED TO REDUCE URBAN BLIGHT (SCRUB), FRIENDS OF FDR PARK and CENTER CITY RESIDENTS	)
and	)
COUNCIL PRESIDENT ANNA VERNA, COUNCILMAN DAVID COHEN and MARY CAWLEY TRACY Appellants	)
vs.	)
ZONING BOARD OF ADJUSTMENT OF CITY OF PHILADELPHIA	)
and	)
THE CITY OF PHILADELPHIA Appellees.	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF ZONING BOARD OF ADJUSTMENT

This appeal is taken by the above named Appellants from a decision of the Zoning Board of Adjustment of the City of Philadelphia ("Zoning Board"), in the Calendar 99-0408, granting a variance for the property located 106 feet south of the South Row of I-95 and 1,579 feet west of Broad Street, Philadelphia, Pennsylvania ("subject property"). Accordingly, as provided by law, the Board makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This case has a history. In September of 1989, Conrail ("Applicant"), by means of its legal representative, applied to the Department of Licenses and Inspections ("L&I") for use registration permits to allow the erection of four (4) outdoor advertising signs on the subject property. L&I determined that the proposed outdoor advertising signs were not a permitted use of a Recreational District, and accordingly issued several refusals to Applicant. (Applications for Zoning and/or Use Registration Permit Nos. 024899, 024901, 024912, 024915; N.T. at 12).

2. Instead of appealing the refusals to the Zoning Board of Adjustment ("Zoning Board"), Applicant sought to have the subject property's zoning classification changed. To this day, Applicant argues that the zoning for the subject property is improper and that it should be changed to a classification that would allow the erection of the proposed outdoor advertising signs as a matter of right. Despite

Applicant's sentiment, the zoning classification for the property continues to be designated as a Recreational District. In addition, special regulations governing outdoor advertising signs have been added to the City of Philadelphia Zoning Code ("Zoning Code") since 1989 which place further restrictions on Applicant's proposed use of the subject property. Finally, Applicant has decided to challenge the property's zoning classification in the court system. In order to accomplish this legal endeavor, Applicant began the process by reapplying to L&I for use registration permits which would allow on the subject property the erection of four (4) outdoor advertising signs. (N.T. at 9, N.T. at 12-13; N.T. at 23; N.T. at 25-27; N.T. at 65).

3. On March 26, 1999, Applicant, again by means of its legal representative, submitted to L&I four (4) separate applications for use registration permits (one for each of the proposed outdoor advertising signs) which would allow on the subject property the erection of four (4), double-faced, "V" shaped, non accessory, outdoor advertising signs: Signs A, B, C and D. Each proposed sign face would measure 60' in width and 20' in height, and each proposed sign would have a total sign area of 2,400 square feet. Signs B, C and D would be located within 660 feet of an ingress and/or egress ramp of I-95; Signs A, C and D would be located within 660 feet of a park and recreational facility under the jurisdiction of the City of Philadelphia Department of Recreation, and Signs B and C would be located with 660 feet of a park under the jurisdiction of the Fairmount Park Commission. In addition, Applicant did not propose to remove any existing outdoor advertising sign of equal or greater size than the proposed signs'. (Applications for Zoning and/or Use Registration

Permit Nos. 990326004, 990326005, 990326006, 990326007; N.T. at 5).

4. L&I determined that Applicant's proposals for the subject property would not comply with the use regulations for a Recreational District and the outdoor advertising regulations as set forth in the Zoning Code at Sections 14-700 and 14-1604. Accordingly, on March 29, 1999, L&I issued eleven (11) use refusals on the permits for Signs A and B. On March 30, 1999, L&I issued six (6) refusals on the permit for Sign C. On March 31, 1999, L&I issued six (6) refusals on the permit for Sign D. (Notices of Refusal of Permit).

5. On April 8, 1999 Applicant filed four (4) separate appeals of the refusals to the Zoning Board. Subsequently, Applicant's appeals were consolidated, and a single public hearing was held before a quorum of the Zoning Board's members on May 12, 1999. (Petitions of Appeal to the Zoning Board; N.T. at 1).

6. On June 23, 1999, a majority of the Zoning Board's members voted to grant Applicant four (4) variances, one for each proposed outdoor advertising sign. (Notice of Decision).

7. The subject property is a narrow strip of land, measuring 2,700 feet in length and approximately 55 feet in width, with the length of the property lying in an east-to-west orientation. It is zoned Recreational. Applicant is the legal owner of the subject property having acquired the property from the Penn Central Transportation Company in March of 1979. (Applications for Zoning and/or Use Registration

Permit Nos. 990326004, 990326005, 990326006, 990326007, Applicant's Exhibit A-11; N.T. at 10; N.T. at 16; Deed, Applicant's Exhibit A- 1).

8. Three (3) sets of railroad tracks span the length of the subject property, dissecting it in half. The tracks are currently used by Applicant, and there are no future plans to discontinue their use. (N.T. at 28; N.T. at 43; N.T. at 62; Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9).

9. The subject property is located south of the I-95 (a/k/a Delaware Expressway) and to the west of Broad Street. The surrounding area is comprised of recreational and industrial properties. (Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9).

10. Located directly to the north of the subject property is the Franklin Delano Roosevelt Park ("FDR Park"), a large recreational area located in the southern region of the City of Philadelphia. The park is zoned Recreational and is owned by the City of Philadelphia. FDR Park is under the jurisdiction of both the Fairmount Park Commission and the City of Philadelphia Department of Recreation. The park provides several recreational amenities, including a museum, tennis courts and numerous athletic fields. Also used by the visitants to FDR Park is a lake situated approximately in the middle of the park. (Applications for Zoning and/or Use Registration Permit Nos. 990326004, 990326005, 990326006, 990326007; N.T at 20; N.T. at 29; N.T. at 31-33; N.T. at 57; Zoning Map,

Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9).

11. Dissecting the southern portion of FDR Park is I-95. This major traffic artery runs parallel to the subject property. I-95 is elevated at this section and has both an egress ramp and an ingress ramp which allow automobiles to access the highway. FDR Park extends underneath I-95's road surface. The portion of the park lying directly beneath I-95 is used as a parking area and as a recreational area for skateboarders and cyclist. (N.T. at 19; N.T, at 30; Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9; *Inquirer* News Article, Applicant's Exhibit A-16).

12. The subject property also cuts across the southern portion of FDR Park. This creates a "sandwiching" effect. The subject property is surrounded by portions of FDR Park directly to the north and to the south. (N.T. at 18; N.T. at 43; Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9).

13. The portion of FDR Park located directly to the south of the subject property, although zoned Recreational, appears not to be used for such a purpose. Existing on the property are several open air parking lots and an industrial/commercial type structure. Directly abutting this portion of FDR Park to the south is the site of the former United States Naval Yard. Several naval ships are still docked in the yard's port. (N.T. at 18; N.T. at 43, Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9).

14. The portion of FDR Park located directly to the north of the subject property is intersected by the Hollander Creek Culvert which gives the land a dual nature. The eastern portion of the property is covered by scrub vegetation and debris. However, the western portion is covered by a woodland. Situated between this portion of FDR Park and the subject property is a fence. However, portions of the fence are missing so access between the subject property and the park is unconstrained. (N.T. at 30; N.T. at 45; N.T. at 55; N.T. at 69; Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9; Applicant's Site Plans, Applicant's Exhibit A-6).

15. Located directly west of FDR Park is the Philadelphia Solid Waste Transfer station and a large petroleum tank farm. (N.T. at 59; Aerial View Map, Applicant's Exhibit A-9).

16. Located to the east of FDR Park is the City of Philadelphia's Stadium District. (Aerial View Map, Applicant's Exhibit A-9).

17. Applicant proposes to erect on the subject property four (4), double-faced, "V" shaped, non accessory, outdoor advertising signs: Signs A, B, C and D. The signs would be positioned in a horizontal row across the length of the property with Sign A located furthest to the west and Sign D located furthest to the east. The proposed distance between each sign would be approximately 587'. Each of the signs' faces would measure 14' in height and 48' in width. (Applicant has reduced the dimensions from its original proposal.) The proposed total sign area for each outdoor

advertising sign would be [2 x (14 x 40)] 1,120 square feet. (Applications for Zoning and/or Use Registration Permit Nos. 990326004, 990326005, 990326006, 990326007; Applicant's Site Plans, Applicant's Exhibit A-6; N.T. at 20).

18. Applicant proposes to locate Sign A within 500 feet of FDR Park. (Applicant's Site Plans, Applicant's Exhibit A-6).

19. Applicant proposes to locate Sign B within 500 feet of FDR Park and within 500 feet of an ingress and an egress ramp to I-95. (Applicant's Site Plans, Applicant's Exhibit A-6).

20. Applicant proposes to locate Sign C and Sign D within 300 feet of an ingress and an egress ramp to I-95 and within 500 Feet of FDR Park. (Applicant's Site Plans, Applicant's Exhibit A-6).

21. Applicant proposes to advertise solely to the vehicular traffic on I-95. In order to accomplish this goal, Applicant proposes to position the apex for each "V" shaped sign towards FDR Park, which would angle the proposed signs' faces almost perpendicular to I-95. In addition, Applicant proposes to support the outdoor advertising signs on separate monopole structures, each measuring 46 feet in height. This would position the bottom of the proposed signs twenty-five (25) feet above I-95's elevated road surface, thereby allowing the passing motorists to view the advertisements. (Applicant's Site Plans, Applicant's Exhibit A-6; N.T. at 21-22).

22. Currently existing on the subject property is a freestanding non accessory sign. (The dimensions for this existing sign were not provided to the Zoning Board.) The existing sign is located at the far West end of the subject property and would be situated approximately 589 feet from Sign A's proposed location. (N.T. at 16, Applicant's Site Plans, Applicant's Exhibit A-6).

23. Applicant proposes not to remove from any of its properties located in the City of Philadelphia an existing sign of equal or greater size than the proposed outdoor advertising signs'. (Applications for Zoning and/or Use Registration Permit Nos. 990326004, 990326005, 990326006, 990326007).

24. Since 1991, Applicant has removed over thirty (30) signboards from its various properties located throughout the City of Philadelphia. (Applicant did not provide the dimensions of the signs that have been removed.) In addition, Applicant has not erected a single outdoor advertising sign on any of its properties located in the City of Philadelphia since 1991. (N.T. at 64-67, Memo from Bob Orlando, Applicant's Exhibit A-12).

25. Applicant proposes to illuminate the four (4) proposed outdoor advertising signs. The illumination would be mounted below each sign and would be focused on the signs faces only. In addition, Applicant proposes that the signs would be non-flashing, non-revolving and not intermittently illuminated. (Applicant's Site Plans, Applicant's Exhibit A-6).

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CONCLUSIONS OF LAW

1. The subject property is zoned Recreational. The Zoning Code permits a property zoned Recreational to be used only for a recreational use or activity. Section 14-701(2). The Code does not provide a definition for the term "recreational." However, *Webster's Third New International Dictionary (Unabridged)* defines the term as being "equipped so as to provide diversions or amusements." Clearly, outdoor advertising signs are not equipped to provide diversions or

amusements, and therefore, Applicant's proposal to erect four (4) outdoor advertising signs on the subject property does not conform to the use requirement for a Recreational property.

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6. The Zoning Code mandates that no more than two (2) sign faces shall be permitted on any one lot and that no more than one (1) support structure shall be permitted on any one lot. Section 14-1604(7). Applicant proposes to erect on the subject property a total of eight (8) sign faces and a total of four (4) sign support structures. Therefore, Applicant's proposal does not conform to this outdoor advertising regulation.

7. The Zoning Code mandates that the maximum sign area of any outdoor advertising sign shall be 1,500 square feet per sign support structure. Section 14-1604(5)(b). Applicant proposes to erect double-faced signs on each support structure. Applicant has agreed to reduce the proposed area for each sign face to 560 square feet (14' x 40'). Hence, Applicant proposes to have a total sign area of only 1,120 square feet (2 x 560) for each support structure. Therefore,

Applicant's proposal does conform to this outdoor advertising regulation.

8. Accordingly, for all the reasons stated above, Applicant's proposals may be permitted only if the criteria for granting a variance are met.

9. To establish entitlement to a zoning variance, an applicant must show an unnecessary hardship resulting from the property's unique physical conditions or circumstances; that such hardship is not self-imposed by the applicant; that granting the variance would not adversely impact the public health, safety or welfare; and that the variance, if authorized, would represent the minimum variance necessary to afford relief. City of Philadelphia Zoning Code at Section 14-1802(1); *Alpine Inc v. Abbington Tp. Zoning Hearing Board*, 654 A.2d 186 (Pa. Commw. Ct 1995); *Carman v. Zoning Board of Adjustment of the City of Philadelphia*, 161 Pa. Commw. 80, 638 A.2d 365 (1994).

10. The Zoning Board concludes that Applicant has met the requirements for granting a variance. The Board agrees with Applicant's position that the zoning classification for the subject property is improper. As set forth in the Zoning Code at Section 14-701(1) parcels of public [emphasis added], land under the jurisdiction of the City of Philadelphia Department of Recreation, Fairmount Park Commission, the Department of Forests and Waters of the Commonwealth of Pennsylvania, and the National Park Services of the United States may be designated as a Recreational District. Clearly, the subject property does not met the Code's requirements for a Recreational zoning designation. First and foremost, the

property is not public land. It is privately owned by Applicant. Second, the property is not under the jurisdiction of any one of the above-mentioned government agencies. The error in the zoning classification is probably the result of a mistaken belief that Applicant did not own the subject property, but instead had an casement. As a result, the zoning map's creators incorrectly included the subject property in FDR Park's zoning classification. The Board cannot begin to imagine how a railroad property with three (3) sets of active tracks could have otherwise been designated as Recreational. Who would want their children or family pets playing in such an area?

Despite the obvious error, as set forth at Section 14-1801(1) of the Zoning Code, the Board has no authority to change a property's zoning classification. However, the Board concludes that in the present ease the error in subject property's zoning does create an unnecessary hardship. In 1991, when Applicant originally applied to L&I for permission to erect the proposed outdoor advertising signs, Applicant may have been issued permits as a matter of right if the zoning classification for the subject property had not been improperly designated as Recreational. When Applicant attempted to rectify the error in zoning, additional regulations were added to the Code which have placed further restrictions on Applicant's proposals for the subject property. In other words, a bureaucratic nightmare has prevented Applicant from making full use of its property resulting in an unnecessary hardship.

12. The hardship presented are not self-imposed by Applicant; it is the result of the erroneous zoning, classification for the subject property.

13. The variance is the minimum necessary to afford relief to Applicant.

14. Applicant has persuasively established that its proposals would not have a negative impact on the public health, safety and welfare. In particular, the Zoning Board is persuaded that the proposed outdoor advertising signs, due to their elevation and position, would not impede the view from FDR Park. In addition, the traffic study report establishes that the safety of persons driving on I-95 would not be jeopardized by the proposed signs.

15. For all of the foregoing reasons, the Zoning Board voted, at Calendar 98-0408, to grant a variance for the property located at 106 feet south of the South Row of I-15 and 1,579 feet west of Broad Street, Philadelphia, Pennsylvania.

Respectfully submitted,

/s/ _____

Robert J. D'Agostino
Administrator
Zoning Board of Adjustment

VOTE OF THE BOARD

THOMAS J. KELLY	YES
SUSAN O.W. JAFFE	NO
ROSALIE M. LEONARD	NO
THOMAS LOGAN	YES
DAVID AUSPITZ	YES

Findings of Fact and Conclusions of Law of the Zoning Board of Adjustment - 07/06/99

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

JULY TERM, 1999

NO. 3700

CITY OF PHILADELPHIA, LAW DEPARTMENT
CHERYL GASTON
DEPUTY CITY SOLICITOR
ATTORNEY IDENTIFICATION NO. 51192
1515 ARCH STREET-16TH FLOOR
PHILADELPHIA, PA 19102-1595
215/683-5116

SOCIETY CREATED TO REDUCE URBAN BLIGHT (SCRUB), et al., Appellants,	)
vs.	)
ZONING BOARD OF ADJUSTMENT OF THE CITY OF PHILADELPHIA AND THE CITY OF PHILADELPHIA, Appellees.	)

TO THE PROTHONOTARY:

The enclosed file constitutes the completed record of the Zoning Board of Adjustment of the City of Philadelphia in connection with the above-captioned matter, which is being

filed with your office in accordance with Local Rule 320 and the Philadelphia Zoning and Planning Code, Title 14 of the Philadelphia Code, at § 14-1807.

STEPHANIE L. FRANKLIN-SUBER
CITY SOLICITOR

/s/ _____
CHERYL L. GASTON
Deputy City Solicitor

Findings of Fact and Conclusions of Law of the Zoning Board of Adjustment - 07/06/99

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

July Term, 1999

No. 003705

SOCIETY CREATED TO REDUCE URBAN BLIGHT (SCRUB), FRIENDS OF FDR PARK and CENTER CITY RESIDENTS

and

COUNCIL PRESIDENT ANNA VERNA, COUNCILMAN DAVID COHEN and MARY CAWLEY TRACY
Appellants

vs.

ZONING BOARD OF ADJUSTMENT OF CITY OF PHILADELPHIA

and

THE CITY OF PHILADELPHIA
Appellees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF ZONING BOARD OF ADJUSTMENT

This appeal is taken by the above named Appellants from a decision of the Zoning Board of Adjustment of the City of Philadelphia ("Zoning Board"), in the Calendar 99-0409, granting a variance for the property located 106 feet south of the South Row of I-95 and 1,579 feet west of Broad Street, Philadelphia, Pennsylvania ("subject property"). Accordingly, as provided by law, the Board makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This case has a history. In September of 1989, Conrail ("Applicant"), by means of its legal representative, applied to the Department of Licenses and Inspections ("L&I") for use registration permits to allow the erection of four (4) outdoor advertising signs on the subject property. L&I determined that the proposed outdoor advertising signs were not a permitted use of a Recreational District, and accordingly issued several refusals to Applicant. (Applications for Zoning and/or Use Registration Permit Nos. 024899, 024901, 024912, 024915; N.T. at 12).

2. Instead of appealing the refusals to the Zoning Board of Adjustment ("Zoning Board"), Applicant sought to have the subject property's zoning classification changed. To this day, Applicant argues that the zoning for the subject property is improper and that it should be changed to a classification that would allow the erection of the proposed outdoor advertising signs as a matter of right. Despite

Applicant's sentiment, the zoning classification for the property continues to be designated as a Recreational District. In addition, special regulations governing outdoor advertising signs have been added to the City of Philadelphia Zoning Code ("Zoning Code") since 1989 which place further restrictions on Applicant's proposed use of the subject property. Finally, Applicant has decided to challenge the property's zoning classification in the court system. In order to accomplish this legal endeavor, Applicant began the process by reapplying to L&I for use registration permits which would allow on the subject property the erection of four (4) outdoor advertising signs. (N.T. at 9; N.T. at 12-13; N.T. at 23; N.T. at 25-27; N.T. at 65).

3. On March 26, 1999, Applicant, again by means of its legal representative, submitted to L&I four (4) separate applications for use registration permits (one for each of the proposed outdoor advertising signs) which would allow on the subject property the erection of four (4), double-faced, "V" shaped, non accessory, outdoor advertising signs: Signs A, B, C and D. Each proposed sign face would measure 60' in width and 20' in height, and each proposed sign would have a total sign area of 2,400 square feet. Signs B, C and D would be located within 660 feet of an ingress and/or egress ramp of I-95; Signs A, C and D would be located within 660 feet of a park and recreational facility under the jurisdiction of the City of Philadelphia Department of Recreation, and Signs B and C would be located with 660 feet of a park under the jurisdiction of the Fairmount Park Commission. In addition, Applicant did not propose to remove any existing outdoor advertising sign of equal or greater size than the proposed signs'. (Applications for Zoning and/or Use Registration

Permit Nos. 990326004, 990326005, 990326006, 990326007; N.T. at 5).

4. L&I determined that Applicant's proposals for the subject property would not comply with the use regulations for a Recreational District and the outdoor advertising regulations as set forth in the Zoning Code at Sections 14-700 and 14-1604. Accordingly, on March 29, 1999, L&I issued eleven (11) use refusals on the permits for Signs A and B. On March 30, 1999, L&I issued six (6) refusals on the permit for Sign C. On March 31, 1999, L&I issued six (6) refusals on the permit for Sign D. (Notices of Refusal of Permit).

5. On April 8, 1999 Applicant filed four (4) separate appeals of the refusals to the Zoning Board. Subsequently, Applicant's appeals were consolidated, and a single public hearing was held before a quorum of the Zoning Board's members on May 12, 1999. (Petitions of Appeal to the Zoning Board; N.T. at 1).

6. On June 23, 1999, a majority of the Zoning Board's members voted to grant Applicant four (4) variances, one for each proposed outdoor advertising sign. (Notice of Decision).

7. The subject property is a narrow strip of land, measuring 2,700 feet in length and approximately 55 feet in width, with the length of the property lying in an east-to-west orientation. It is zoned Recreational. Applicant is the legal owner of the subject property having acquired the property from the Penn Central Transportation Company in March of 1979. (Applications for Zoning and/or Use Registration

Permit Nos. 990326004, 990326005, 990326006, 990326007, Applicant's Exhibit A-11; N.T. at 10; N.T. at 16; Deed, Applicant's Exhibit A- 1).

8. Three (3) sets of railroad tracks span the length of the subject property, dissecting it in half. The tracks are currently used by Applicant, and there are no future plans to discontinue their use. (N.T. at 28; N.T. at 43; N.T. at 62; Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9).

9. The subject property is located south of the I-95 (a/k/a Delaware Expressway) and to the west of Broad Street. The surrounding area is comprised of recreational and industrial properties. (Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9).

10. Located directly to the north of the subject property is the Franklin Delano Roosevelt Park ("FDR Park"), a large recreational area located in the southern region of the City of Philadelphia. The park is zoned Recreational and is owned by the City of Philadelphia. FDR Park is under the jurisdiction of both the Fairmount Park Commission and the City of Philadelphia Department of Recreation. The park provides several recreational amenities, including a museum, tennis courts and numerous athletic fields. Also used by the visitants to FDR Park is a lake situated approximately in the middle of the park. (Applications for Zoning and/or Use Registration Permit Nos. 990326004, 990326005, 990326006, 990326007; N.T at 20; N.T. at 29; N.T. at 31-33; N.T. at 57; Zoning Map,

Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9).

11. Dissecting the southern portion of FDR Park is I-95. This major traffic artery runs parallel to the subject property. I-95 is elevated at this section and has both an egress ramp and an ingress ramp which allow automobiles to access the highway. FDR Park extends underneath I-95's road surface. The portion of the park lying directly beneath I-95 is used as a parking area and as a recreational area for skateboarders and cyclist. (N.T. at 19; N.T, at 30; Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9; *Inquirer* News Article, Applicant's Exhibit A-16).

12. The subject property also cuts across the southern portion of FDR Park. This creates a "sandwiching" effect. The subject property is surrounded by portions of FDR Park directly to the north and to the south. (N.T. at 18; N.T. at 43; Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9).

13. The portion of FDR Park located directly to the south of the subject property, although zoned Recreational, appears not to be used for such a purpose. Existing on the property are several open air parking lots and an industrial/commercial type structure. Directly abutting this portion of FDR Park to the south is the site of the former United States Naval Yard. Several naval ships are still docked in the yard's port. (N.T. at 18; N.T. at 43, Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9).

14. The portion of FDR Park located directly to the north of the subject property is intersected by the Hollander Creek Culvert which gives the land a dual nature. The eastern portion of the property is covered by scrub vegetation and debris. However, the western portion is covered by a woodland. Situated between this portion of FDR Park and the subject property is a fence. However, portions of the fence are missing so access between the subject property and the park is unconstrained. (N.T. at 30; N.T. at 45; N.T. at 55; N.T. at 69; Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9; Applicant's Site Plans, Applicant's Exhibit A-6).

15. Located directly west of FDR Park is the Philadelphia Solid Waste Transfer station and a large petroleum tank farm. (N.T. at 59; Aerial View Map, Applicant's Exhibit A-9).

16. Located to the east of FDR Park is the City of Philadelphia's Stadium District. (Aerial View Map, Applicant's Exhibit A-9).

17. Applicant proposes to erect on the subject property four (4), double-faced, "V" shaped, non accessory, outdoor advertising signs: Signs A, B, C and D. The signs would be positioned in a horizontal row across the length of the property with Sign A located furthest to the west and Sign D located furthest to the east. The proposed distance between each sign would be approximately 587'. Each of the signs' faces would measure 14' in height and 48' in width. (Applicant has reduced the dimensions from its original proposal.) The proposed total sign area for each outdoor

advertising sign would be [2 x (14 x 40)] 1,120 square feet. (Applications for Zoning and/or Use Registration Permit Nos. 990326004, 990326005, 990326006, 990326007; Applicant's Site Plans, Applicant's Exhibit A-6; N.T. at 20).

18. Applicant proposes to locate Sign A within 500 feet of FDR Park. (Applicant's Site Plans, Applicant's Exhibit A-6).

19. Applicant proposes to locate Sign B within 500 feet of FDR Park and within 500 feet of an ingress and an egress ramp to I-95. (Applicant's Site Plans, Applicant's Exhibit A-6).

20. Applicant proposes to locate Sign C and Sign D within 300 feet of an ingress and an egress ramp to I-95 and within 500 Feet of FDR Park. (Applicant's Site Plans, Applicant's Exhibit A-6).

21. Applicant proposes to advertise solely to the vehicular traffic on I-95. In order to accomplish this goal, Applicant proposes to position the apex for each "V" shaped sign towards FDR Park, which would angle the proposed signs' faces almost perpendicular to I-95. In addition, Applicant proposes to support the outdoor advertising signs on separate monopole structures, each measuring 46 feet in height. This would position the bottom of the proposed signs twenty-five (25) feet above I-95's elevated road surface, thereby allowing the passing motorists to view the advertisements. (Applicant's Site Plans, Applicant's Exhibit A-6; N.T. at 21-22).

22. Currently existing on the subject property is a freestanding non accessory sign. (The dimensions for this existing sign were not provided to the Zoning Board.) The existing sign is located at the far West end of the subject property and would be situated approximately 589 feet from Sign A's proposed location. (N.T. at 16, Applicant's Site Plans, Applicant's Exhibit A-6).

23. Applicant proposes not to remove from any of its properties located in the City of Philadelphia an existing sign of equal or greater size than the proposed outdoor advertising signs'. (Applications for Zoning and/or Use Registration Permit Nos. 990326004, 990326005, 990326006, 990326007).

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7. The Zoning Code mandates that the maximum sign area of any outdoor advertising sign shall be 1,500 square feet per sign support structure. Section 14-1604(5)(b). Applicant proposes to erect double-faced signs on each support structure. Applicant has agreed to reduce the proposed area for each sign face to 560 square feet (14' x 40'). Hence, Applicant proposes to have a total sign area of only 1,120 square feet (2 x 560) for each support structure. Therefore, Applicant's proposal does conform to this outdoor advertising regulation.

8. Accordingly, for all the reasons stated above, Applicant's proposals may be permitted only if the criteria for granting a variance are met.

9. To establish entitlement to a zoning variance, an applicant must show an unnecessary hardship resulting from the property's unique physical conditions or circumstances; that such hardship is not self-imposed by the applicant; that granting the variance would not adversely impact the public health, safety or welfare; and that the variance, if authorized, would represent the minimum variance necessary to afford relief. City of Philadelphia Zoning Code at Section 14-1802(1); *Alpine Inc v. Abbington Tp. Zoning Hearing Board*, 654 A.2d 186 (Pa. Commw. Ct 1995); *Carman v. Zoning Board of Adjustment of the City of Philadelphia*, 161 Pa. Commw. 80, 638 A.2d 365 (1994).

10. The Zoning Board concludes that Applicant has met the requirements for granting a variance. The Board agrees with Applicant's position that the zoning classification for the subject property is improper. As set forth in the Zoning Code at Section 14-701(1) parcels of public [emphasis added], land under the jurisdiction of the City of Philadelphia Department of Recreation, Fairmount Park Commission, the Department of Forests and Waters of the Commonwealth of Pennsylvania, and the National Park Services of the United States may be designated as a Recreational District. Clearly, the subject property does not met the Code's requirements for a Recreational zoning designation. First and foremost, the property is not public land. It is privately owned by Applicant. Second, the property is not under the jurisdiction of any one of the above-mentioned government agencies. The

error in the zoning classification is probably the result of a mistaken belief that Applicant did not own the subject property, but instead had an casement. As a result, the zoning map's creators incorrectly included the subject property in FDR Park's zoning classification. The Board cannot begin to imagine how a railroad property with three (3) sets of active tracks could have otherwise been designated as Recreational. Who would want their children or family pets playing in such an area?

Despite the obvious error, as set forth at Section 14-1801(1) of the Zoning Code, the Board has no authority to change a property's zoning classification. However, the Board concludes that in the present ease the error in subject property's zoning does create an unnecessary hardship. In 1991, when Applicant originally applied to L&I for permission to erect the proposed outdoor advertising signs, Applicant may have been issued permits as a matter of right if the zoning classification for the subject property had not been improperly designated as Recreational. When Applicant attempted to rectify the error in zoning, additional regulations were added to the Code which have placed further restrictions on Applicant's proposals for the subject property. In other words, a bureaucratic nightmare has prevented Applicant from making full use of its property resulting in an unnecessary hardship.

12. The hardship presented are not self-imposed by Applicant; it is the result of the erroneous zoning, classification for the subject property.

13. The variance is the minimum necessary to afford relief to Applicant.

14. Applicant has persuasively established that its proposals would not have a negative impact on the public health, safety and welfare. In particular, the Zoning Board is persuaded that the proposed outdoor advertising signs, due to their elevation and position, would not impede the view from FDR Park. In addition, the traffic study report establishes that the safety of persons driving on I-95 would not be jeopardized by the proposed signs.

15. For all of the foregoing reasons, the Zoning Board voted, at Calendar 98-0409, to grant a variance for the property located at 122 feet south of the South Row of I-95, Philadelphia, Pennsylvania.

Respectfully submitted,

/s/ _____
Robert J. D'Agostino
Administrator
Zoning Board of Adjustment

VOTE OF THE BOARD

THOMAS J. KELLY	YES
SUSAN O.W. JAFFE	NO
ROSALIE M. LEONARD	NO
THOMAS LOGAN	YES
DAVID AUSPITZ	YES

Findings of Fact and Conclusions of Law of the Zoning Board of Adjustment - 07/06/99

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

JULY TERM, 1999

NO. 3705

CITY OF PHILADELPHIA, LAW DEPARTMENT
CHERYL GASTON
DEPUTY CITY SOLICITOR
ATTORNEY IDENTIFICATION NO. 51192
1515 ARCH STREET-16TH FLOOR
PHILADELPHIA, PA 19102-1595
215/683-5116

SOCIETY CREATED TO REDUCE URBAN BLIGHT (SCRUB), et al., Appellants,	)
vs.	)
ZONING BOARD OF ADJUSTMENT OF THE CITY OF PHILADELPHIA AND THE CITY OF PHILADELPHIA, Appellees.	)

TO THE PROTHONOTARY:

The enclosed file constitutes the completed record of the Zoning Board of Adjustment of the City of Philadelphia in connection with the above-captioned matter, which is being

filed with your office in accordance with Local Rule 320 and the Philadelphia Zoning and Planning Code, Title 14 of the Philadelphia Code, at § 14-1807.

STEPHANIE L. FRANKLIN-SUBER
CITY SOLICITOR

/s/ _____
CHERYL L. GASTON
Deputy City Solicitor

Findings of Fact and Conclusions of Law of the Zoning Board of Adjustment - 07/06/99

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

July Term, 1999

No. 003707

SOCIETY CREATED TO REDUCE URBAN BLIGHT (SCRUB), FRIENDS OF FDR PARK and CENTER CITY RESIDENTS	)
and	)
COUNCIL PRESIDENT ANNA VERNA, COUNCILMAN DAVID COHEN and MARY CAWLEY TRACY Appellants	)
vs.	)
ZONING BOARD OF ADJUSTMENT OF CITY OF PHILADELPHIA	)
and	)
THE CITY OF PHILADELPHIA Appellees.	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF ZONING BOARD OF ADJUSTMENT

This appeal is taken by the above named Appellant from a decision of the Zoning Board of Adjustment of the City of Philadelphia ("Zoning Board"), in the Calendar 99-0410, granting a variance for the property located approximately 405 feet west of the West Line of Broad Street and approximately 15 feet south of the South Row of I-95, Philadelphia, Pennsylvania ("subject property"). Accordingly, as provided by law, the Board makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This case has a history. In September of 1989, Conrail ("Applicant"), by means of its legal representative, applied to the Department of Licenses and Inspections ("L&I") for use registration permits to allow the erection of four (4) outdoor advertising signs on the subject property. L&I determined that the proposed outdoor advertising signs were not a permitted use of a Recreational District, and accordingly issued several refusals to Applicant. (Applications for Zoning and/or Use Registration Permit Nos. 024899, 024901, 024912, 024915; N.T. at 12).

2. Instead of appealing the refusals to the Zoning Board of Adjustment ("Zoning Board"), Applicant sought to have the subject property's zoning classification changed. To this day, Applicant argues that the zoning for the subject property is improper and that it should be changed to a classification that would allow the erection of the proposed

outdoor advertising signs as a matter of right. Despite Applicant's sentiment, the zoning classification for the property continues to be designated as a Recreational District. In addition, special regulations governing outdoor advertising signs have been added to the City of Philadelphia Zoning Code ("Zoning Code") since 1989 which place further restrictions on Applicant's proposed use of the subject property. Finally, Applicant has decided to challenge the property's zoning classification in the court system. In order to accomplish this legal endeavor, Applicant began the process by reapplying to L&I for use registration permits which would allow on the subject property the erection of four (4) outdoor advertising signs. (N.T. at 9; N.T. at 12-13; N.T. at 23; N.T. at 25-27; N.T. at 66).

3. On March 26, 1999, Applicant, again by means of its legal representative, submitted to L&I four (4) separate applications for use registration permits (one for each of the proposed outdoor advertising signs) which would allow on the subject property the erection of four (4), double-faced, "V" shaped, non accessory, outdoor advertising signs: Signs A, B, C and D. Each proposed sign face would measure 60' in width and 20' in height, and each proposed sign would have a total sign area of 2,400 square feet. Signs B, C and D would be located within 660 feet of an ingress and/or egress ramp of I-95; Signs A, C and D would be located within 660 feet of a park and recreational facility under the jurisdiction of the City of Philadelphia Department of Recreation, and Signs B and C would be located with 660 feet of a park under the jurisdiction of the Fairmount Park Commission. In addition, Applicant did not propose to remove any existing outdoor advertising sign of equal or greater size than the proposed

signs'. (Applications for Zoning and/or Use Registration Permit Nos. 990326004, 990326005, 990326006, 990326007; N.T. at 5).

4. L&I determined that Applicant's proposals for the subject property would not comply with the use regulations for a Recreational District and the outdoor advertising regulations as set forth in the Zoning Code at Sections 14-700 and 14-1604. Accordingly, on March 29, 1999, L&I issued eleven (11) use refusals on the permits for Signs A and B. On March 30, 1999, L&I issued six (6) refusals on the permit for Sign C: On March 31, 1999, L&I issued six (6) refusals on the permit for Sign D. (Notices of Refusal of Permit).

5. On April 8, 1999 Applicant filed four (4) separate appeals of the refusals to the Zoning Board. Subsequently, Applicant's appeals were consolidated, and a single public hearing was held before a quorum of the Zoning Board's members on May 12, 1999. (Petitions of Appeal to the Zoning Board; N.T. at 1).

6. On June 23, 1999, a majority of the Zoning Board's members voted to grant Applicant four (4) variances, one for each proposed outdoor advertising sign. (Notice of Decision).

7. The subject property is a narrow strip of land, measuring 2,700 feet in length and approximately 55 feet in width, with the length of the property lying in an east-to-west orientation. It is zoned Recreational. Applicant is the legal owner of the subject property having acquired the property from the Penn Central Transportation Company in March of

1979. (Applications for Zoning and/or Use Registration Permit Nos. 990326004, 990326005, 990326006, 990326007, Applicant's Exhibit A-11; N.T. at 10; N.T. at 16; Deed, Applicant's Exhibit A-1).

8. Three (3) sets of railroad tracks span the length of the subject property, dissecting it in half. The tracks are currently used by Applicant, and there are no future plans to discontinue their use. (N.T. at 28; N.T at 43; N.T. at 62; Zoning Map, Applicant's Exhibit A-8, Aerial View Map, Applicant's Exhibit A-9).

9. The subject property is located south of the I-95 (a/k/a Delaware Expressway) and to the west of Broad Street. The surrounding area is comprised of recreational and industrial properties. (Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9).

10. Located directly to the north of the subject property is the Franklin Delano Roosevelt Park ("FDR Park"), a large recreational area located in the southern region of the City of Philadelphia. The park is zoned Recreational and is owned by the City of Philadelphia. FDR Park is under the jurisdiction of both the Fairmount Park Commission and the City of Philadelphia Department of Recreation. The park provides several recreational amenities, including a museum, tennis courts and numerous athletic fields. Also used by the visitants to FDR Park is a lake situated approximately in the middle of the park. (Applications for Zoning and/or Use Registration Permit Nos. 990326004, 990326005, 990326006, 990326007; N.T at 20; N.T. at 29; N.T. at 31-33; N.T. at 57; Zoning Map,

Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9).

11. Dissecting the southern portion of FDR. Park is I-95. This major traffic artery runs parallel to the subject property. I-95 is elevated at this section and has both an egress ramp and an ingress ramp which allow automobiles to access the highway. FDR Park extends underneath I-95's road surface. The portion of the park lying directly beneath I-95 is used as a parking area and as a recreational area for skateboarders and cyclist. (N.T. at 19; N.T. at 30; Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9; *Inquirer* News Article, Applicant's Exhibit A-16).

12. The subject property also cuts across the southern portion of FDR Park. This creates a "sandwiching" effect. The subject property is surrounded by portions of FDR Park directly to the north and to the south. (N.T. at 18, N.T. at 43; Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9).

13. The portion of FDR Park located directly to the south of the subject property, although zoned Recreational, appears not to be used for such a purpose. Existing on the property are several open air parking lots and an industrial/commercial type structure. Directly abutting this portion of FDR Park to the south is the site of the former United States Naval Yard. Several naval ships are still docked in the yard's port. (N.T. at 18; N.T. at 43; Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9).

14. The portion of FDR Park located directly to the north of the subject property is intersected by the Hollander Creek Culvert which gives the land a dual nature. The eastern portion of the property is covered by scrub vegetation and debris. However, the western portion is covered by a woodland. Situated between this portion of FDR Park and the subject property is a fence. However, portions of the fence are missing so access between the subject property and the park is unconstrained. (N.T. at 30; N.T. at 45; N.T. at 55; N.T. at 69; Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9; Applicant's Site Plans, Applicant's Exhibit A-6).

15. Located directly west of FDR Park is the Philadelphia Solid Waste Transfer station and a large petroleum tank farm. (N.T. at 59; Aerial View Map, Applicant's Exhibit A-9).

16. Located to the east of FDR Park is the City of Philadelphia's Stadium District. (Aerial View Map, Applicant's Exhibit A-9).

17. Applicant proposes to erect on the subject property four (4), double-faced, "V" shaped, non accessory, outdoor advertising signs: Signs A, B, C and D. The signs would be positioned in a horizontal row across the length of the property with Sign A located furthest to the west and Sign D located furthest to the east. The proposed distance between each sign would be approximately 587'. Each of the signs' faces would measure 14' in height and 48' in width. (Applicant has reduced the dimensions from its original proposal.) The proposed total sign area for each outdoor

advertising sign would be [2 x (14 x 40)] 1,120 square feet. (Applications for Zoning and/or Use Registration Permit Nos. 990326004, 990326005, 990326006, 990326007; Applicant's Site Plans, Applicant's Exhibit A-6; N.T. at 20).

18. Applicant proposes to locate Sign A within 500 feet of FDR Park. (Applicant's Site Plans, Applicant's Exhibit A-6).

19. Applicant proposes to locate Sign B within 500 feet of FDR Park and within 500 feet of an ingress and an egress ramp to I-95. (Applicant's Site Plans, Applicant's Exhibit A-6).

20. Applicant proposes to locate Sign C and Sign D within 300 feet of an ingress and an egress ramp to I-95 and within 500 Feet of FDR Park. (Applicant's Site Plans, Applicant's Exhibit A-6):

21. Applicant proposes to advertise solely to the vehicular traffic on I-95. In order to accomplish this goal, Applicant proposes to position the apex for each "V" shaped sign towards FDR Park, which would angle the proposed signs' faces almost perpendicular to I-95. In addition, Applicant proposes to support the outdoor advertising signs on separate monopole structures, each measuring 46 feet in height. This would position the bottom of the proposed signs twenty-five (23) feet above I-95's elevated road surface, thereby allowing the passing motorists to view the advertisements. (Applicant's Site Plans, Applicant's Exhibit A-6; N.T. at 21-22).

22. Currently existing on the subject property is a freestanding non accessory sign. (The dimensions for this existing sign were not provided to the Zoning Board.) The existing sign is located at the far west end of the subject property and would be situated approximately 589 feet from Sign A's proposed location. (N.T. at 16; Applicant's Site Plans, Applicant's Exhibit A-6).

23. Applicant proposes not to remove from any of its properties located in the City of Philadelphia an existing sign of equal or greater size than the proposed outdoor advertising signs'. (Applications for Zoning and/or Use Registration Permit Nos. 990326004, 990326005, 990326006, 990326007).

24. Since 1991, Applicant has removed over thirty (30) signboards from its various properties located throughout the City of Philadelphia. (Applicant did not provide the dimensions of the signs that have been removed.) In addition, Applicant has not erected a single outdoor advertising sign on any of its properties located in the City &Philadelphia since 1991. (N.T. at 64-67; Memo from Bob Orlando, Applicant's Exhibit A-12).

25. Applicant proposes to illuminate the four (4) proposed outdoor advertising signs. The illumination would be mounted below each sign and would be focused on the signs' faces only. In addition, Applicant proposes that the signs would be non-flashing, non-revolving and not intermittently illuminated. (Applicant's Site Plans, Applicant's Exhibit A-6).

26. Albert Tantala, a licensed engineer, opined that the proposed outdoor advertising signs would not be visible to the visitors to FDR Park. Mr. Tantala explained that because the signs' apexes would be pointed towards the park, if viewed from a distance, the signs would appear as "dots on the horizon" and would blend into the background with the naval ships' tall masts. If viewed up close, the elevation of the proposed signs would cause them to disappear from view. Mr. Tantala further opined that the subject property's zoning classification was erroneous because the property is privately owned and not under the jurisdiction of the Fairmount Park Commission, the City of Philadelphia Department of Recreation or the U.S. Department of Forestries. Mr. Tantala further opined that the subject property should be zoned either Least Restrictive or General Industrial. (N.T. at 24; N.T. at 31-32).

27. Joseph Bucovetsky, a certified land use and planner, opined that to require the subject property to be used as a recreational property would be improper. Mr. Bucovetsky explained that the recreational use of the subject area ceases at the point where I-95 intersects FDK Park. Mr. Bucovetsky agreed with Albert Tantala that that property's zoning classification should be changed to reflect its current use. In addition, Mr. Bucovetsky agreed that the proposed signs would have no negative impact on the subject property or the surrounding area. (N.T. at 50-53; Report prepared by Joseph Bucovetsky, Applicant's Exhibit A-15).

28. The Zoning Board heard and considered testimony from various taxpayers and residents of the City of Philadelphia in opposition to Applicant's proposals: John

Grady, Vice President of Philadelphia Industrial Development Corporation; Stephanie Andrews, representative for Friends of Philadelphia Parks; Judith Ingram, representative for Center City Residents Association; John Strueble; Mary Tracy, President of Society Created to Reduce Urban Blight. The Board notes that not one of these Protestants resides in the vicinity of the subject area. (N.T. at 71-90).

29. The Zoning Board has received and considered a report from Tantala Associates regarding the impact outdoor advertising signs have on traffic safety. The report indicates that there is no correlation between outdoor advertising signs and traffic safety. (Traffic Study Report from Tantala Associates, Applicant's Exhibit A-14).

30. The Zoning Board has received and considered various letters from community leaders and associations in opposition to Applicant's proposals. (Letter from Robert Jaffe, Special Counsel to Councilman-At-Large David Cohen, dated June 21, 1999; Letter from Council President Anna Verna dated May 25, 1999; Letter from Friends of F.D.R. dated May 19, 1999; Letter from SCRUB dated May 11, 1999; Letter from the Philadelphia Industrial Development Corporation dated May 11, 1999).

31. The Zoning Board has received and considered a written report prepared by Gray Smith, an architect and urban planning consultant, in opposition to Applicant's proposals. The Board notes that Mr. Smith did not appear at the public hearing to testify, and therefore, the facts and opinions in his report were never subjected to cross examination. (Analysis

and Opinion Report prepared on June 10, 1999 by Gray Smith's Office).

32. The Zoning Board has received and considered a letter from the Fairmount Park Commission. The Commission indicates in its letter that according to Fairmount Park regulations, any proposed outdoor advertising signs, which would be located within close proximity to Fairmount Park property, must be reviewed for esthetic impact. The Commission further indicates that it has not been provided such an opportunity concerning Applicant's proposed signs, and therefore, until such review takes place, it has concerns over the placement of the proposed signs. (Letter from William Mifflin dated May 11, 1999).

33. The Zoning Board has received and considered a letter from Barbara J. Kaplan, Executive Director of Philadelphia's City Planning Commission recommending that Applicant's requested variances not be granted. (Letter dated May 11, 1999).

CONCLUSIONS OF LAW

1. The subject property is zoned Recreational. The Zoning Code permits a property zoned Recreational to be used only for a recreational use or activity. Section 14-701(2). The Code does not provide a definition for the term "recreational." However, *Webster's Third New International Dictionary (Unabridged)* defines the term as being "equipped so as to provide diversions or amusements." Clearly, outdoor advertising signs are not equipped to provide diversions or amusements, and therefore, Applicant's proposal to erect four

(4) outdoor advertising signs on the subject property does not conform to the use requirement for a Recreational property.

2. The Zoning Code prohibits an outdoor advertising sign to be located within 660 feet of all ingress and/or egress ramps of I-95 (a/k/a Delaware Expressway). Section 14-1604(9)(b). Applicant proposes to locate Sign B within 500 feet, and Sign C and D within 300 feet, of an egress ramp and an ingress ramp of I-95. Therefore, Applicant's proposal does not conform to this outdoor advertising regulation.

3. The Zoning Code prohibits an outdoor advertising sign to be located within 660 feet of any park under the jurisdiction of the Fairmount Park Commission. Section 14-1604(9)(m). Applicant proposes to locate Sign A, B, C and D within 500 feet of FDK Park, a park under the jurisdiction of the Fairmount Park Commission. Therefore, Applicant's proposal does not conform to this outdoor advertising regulation.

4. The Zoning Code prohibits an outdoor advertising sign to be located within 660 feet of any park or recreational facility under the jurisdiction of the City of Philadelphia Department of Recreation. Section 14-1604(9)(n). Applicant proposes to locate Sign A, B, C and D within 500 feet of FDR Park, a park under the jurisdiction of the City of Philadelphia Department of Recreation. Therefore, Applicant's proposal does not conform to this outdoor advertising regulation.

5. The Zoning Code requires that as a condition for the issuance of a permit to erect an outdoor advertising sign,

an existing sign encompassing equal or greater sign area shall be removed by the applicant. Section 14-1604(10)(a). Applicant's proposals do not include removing any existing signs from any of its properties located throughout the City of Philadelphia. The Zoning Board rejects Applicant's assertion that it has satisfied this regulation by removing thirty (30) signs previously from its property. Applicant failed to provide the dimensional measurements for these previously removed signs, and thus, the Board cannot presume that the signs were of a sufficient size to satisfy the regulation's requirements. Therefore, Applicant's proposal does not conform to this outdoor advertising regulation.

6. The Zoning Code mandates that no more than two (2) sign faces shall be permitted on any one lot and that no more than one (1) support structure shall be permitted on any one lot. Section 14-1604(7). Applicant proposes to erect on the subject property a total of eight (8) sign faces and a total of four (4) sign support structures. Therefore, Applicant's proposal does not conform to this outdoor advertising regulation.

7. The Zoning Code mandates that the maximum sign area of any outdoor advertising sign shall be 1,500 square feet per sign support structure. Section 14-1504(5)(b). Applicant proposes to erect double-faced signs on each support structure. Applicant has agreed to reduce the proposed area for each sign face to 560 square feet (14' x 40'). Hence, Applicant proposes to have a total sign area of only 1,120 square feet (2 x 560) for each support structure. Therefore, Applicant's proposal does conform to this outdoor advertising regulation.

8. Accordingly, for all the reasons stated above, Applicant's proposals may be permitted only if the criteria for granting a variance are met.

9. To establish entitlement to a zoning variance, an applicant must show an unnecessary hardship resulting from the property's unique physical conditions or circumstances; that such hardship is not sell-imposed by the applicant; that granting the variance would not adversely impact the public health, safety or welfare; and that the variance, if authorized, would represent the minimum variance necessary to afford relief. City of Philadelphia Zoning Code at Section 14-1802(1); *Alpine Inc v. Abbington Tp. Zoning Hearing Board*, 654 A.2d 186 (Pa. Commw. Ct 1995); *Carman v. Zoning Board of Adjustment of the City of Philadelphia*, 161 Pa. Commw. 80, 638 A.2d 365 (1994).

10. The Zoning Board concludes that Applicant has met the requirements for granting a variance. The Board agrees with Applicant's position that the zoning classification for the subject property is improper. As set forth in the Zoning Code at Section 14-701(1) parcels of public [emphasis added] land under the jurisdiction of the City of Philadelphia Department of Recreation, Fairmount Park Commission, the Department of Forests and Waters of the Commonwealth of Pennsylvania, and the National Park Services of the United States may be designated as a Recreational District. Clearly, the subject property does not met the Code's requirements for a Recreational zoning designation. First and foremost, the property is not public land. It is privately owned by Applicant. Second, the property is not under the jurisdiction of any one of the above-mentioned government agencies. The

error in the zoning classification is probably the result of a mistaken belief that Applicant did not own the subject property, but instead had an easement. As a result, the zoning map's creators incorrectly included the subject property in FDR Park's zoning classification. The Board cannot begin to imagine how a railroad property with three (3) sets of active tracks could have otherwise been designated as Recreational. Who would want their children or family pets playing in such an area?

Despite the obvious error, as set forth at Section 14-1801 (1) of the Zoning Code, the Board has no authority to change a property's zoning classification. However, the Board concludes that in the present case the error in subject property's zoning does create an unnecessary hardship. In 1991, when Applicant originally applied to L&I for permission to erect the proposed outdoor advertising signs, Applicant may have been issued permits as a matter of right if the zoning classification for the subject property had not been improperly designated as Recreational. When Applicant attempted to rectify the error in zoning, additional regulations were added to the Code which have placed further restrictions on Applicant's proposals for the subject property. In other words, a bureaucratic nightmare has prevented Applicant from making full use of its property resulting in an unnecessary hardship.

12. The hardship presented are not self-imposed by Applicant; it is the result of the erroneous zoning classification for the subject property.

13. The variance is the minimum necessary to afford relief to Applicant.

14. Applicant has persuasively established that its proposals would not have a negative impact on the public health, safety and welfare. In particular, the Zoning Board is persuaded that the proposed outdoor advertising signs, due to their elevation and position, would not impede the view from FDK Park. In addition, the traffic study report establishes that the safety of persons driving on I-95 would not be jeopardized by the proposed signs.

15. For all of the foregoing reasons, the Zoning Board voted, at Calendar 99-0410, to grant a variance for the property located at approximately 405 feet west of the West Line of Broad Street and approximately 15 feet south of the South Row of I-95, Philadelphia, Pennsylvania.

Respectfully submitted,

/s/ _____
Robert J. D'Agostino
Administrator
Zoning Board of Adjustment

VOTE OF THE BOARD

THOMAS J. KELLY	YES
SUSAN O.W. JAFFE	NO
ROSALIE M. LEONARD	NO
THOMAS LOGAN	YES
DAVID AUSPITZ	YES

Findings of Fact and Conclusions of Law of the Zoning Board of Adjustment - 07/06/99

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

JULY TERM, 1999

NO. 3707

CITY OF PHILADELPHIA, LAW DEPARTMENT
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SOCIETY CREATED TO REDUCE URBAN BLIGHT (SCRUB), et al.,
Appellants,

vs.

ZONING BOARD OF ADJUSTMENT OF THE CITY OF PHILADELPHIA AND THE CITY OF PHILADELPHIA,
Appellees.

TO THE PROTHONOTARY:

The enclosed file constitutes the completed record of the Zoning Board of Adjustment of the City of Philadelphia in connection with the above-captioned matter, which is being

filed with your office in accordance with Local Rule 320 and the Philadelphia Zoning and Planning Code, Title 14 of the Philadelphia Code, at § 14-1807.

STEPHANIE L. FRANKLIN-SUBER
CITY SOLICITOR

/s/ _____
CHERYL L. GASTON
Deputy City Solicitor

Findings of Fact and Conclusions of Law of the Zoning Board of Adjustment - 07/06/99

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

July Term, 1999

No. 003712

SOCIETY CREATED TO REDUCE URBAN BLIGHT (SCRUB), FRIENDS OF FDR PARK and CENTER CITY RESIDENTS

and

COUNCIL PRESIDENT ANNA VERNA, COUNCILMAN DAVID COHEN and MARY CAWLEY TRACY
Appellants

vs.

ZONING BOARD OF ADJUSTMENT OF CITY OF PHILADELPHIA

and

THE CITY OF PHILADELPHIA
Appellees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF ZONING BOARD OF ADJUSTMENT

This appeal is taken by the above named Appellant from a decision of the Zoning Board of Adjustment of the City of Philadelphia ("Zoning Board"), in the Calendar 99-0407, granting a variance for the property located approximately 48 feet south of the South Row of I-95 and approximately 992 feet west of the West Building Line of Broad Street, Philadelphia, Pennsylvania ("subject property"). Accordingly, as provided by law, the Board makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This case has a history. In September of 1989, Conrail ("Applicant"), by means of its legal representative, applied to the Department of Licenses and Inspections ("L&I") for use registration permits to allow the erection of four (4) outdoor advertising signs on the subject property. L&I determined that the proposed outdoor advertising signs were not a permitted use of a Recreational District, and accordingly issued several refusals to Applicant. (Applications for Zoning and/or Use Registration Permit Nos. 024899, 024901, 024912, 024915; N.T. at 12).

2. Instead of appealing the refusals to the Zoning Board of Adjustment ("Zoning Board"), Applicant sought to have the subject property's zoning classification changed. To this day, Applicant argues that the zoning for the subject property is improper and that it should be changed to a

classification that would allow the erection of the proposed outdoor advertising signs as a matter of right. Despite Applicant's sentiment, the zoning classification for the property continues to be designated as a Recreational District. In addition, special regulations governing outdoor advertising signs have been added to the City of Philadelphia Zoning Code ("Zoning Code") since 1989 which place further restrictions on Applicant's proposed use of the subject property. Finally, Applicant has decided to challenge the property's zoning classification in the court system. In order to accomplish this legal endeavor, Applicant began the process by reapplying to L&I for use registration permits which would allow on the subject property the erection of four (4) outdoor advertising signs. (N.T. at 9, N.T. at 12-13; N.T. at 23; N.T. at 25-27; N.T. at 65).

3. On March 26, 1999, Applicant, again by means of its legal representative, submitted to L&I four (4) separate applications for use registration permits (one for each of the proposed outdoor advertising signs) which would allow on the subject property the erection of four (4), double-faced, "V" shaped, non accessory, outdoor advertising signs: Signs A, B, C and D. Each proposed sign face would measure 60' in width and 20' in height, and each proposed sign would have a total sign area of 2,400 square feet. Signs B, C and D would be located within 660 feet of an ingress and/or egress ramp of I-95; Signs A, C and D would be located within 660 feet of a park and recreational facility under the jurisdiction of the City of Philadelphia Department of Recreation, and Signs B and C would be located with 660 feet of a park under the jurisdiction of the Fairmount Park Commission. In addition, Applicant did not propose to remove any existing outdoor

advertising sign of equal or greater size than the proposed signs'. (Applications for Zoning and/or Use Registration Permit Nos. 990326004, 990326005, 990326006, 990326007; N.T. at 5).

4. L&I determined that Applicant's proposals for the subject property would not comply with the use regulations for a Recreational District and the outdoor advertising regulations as set forth in the Zoning Code at Sections 14-700 and 14-1604. Accordingly, on March 29, 1999, L&I issued eleven (11) use refusals on the permits for Signs A and B. On March 30, 1999, L&I issued six (6) refusals on the permit for Sign C. On March 31, 1999, L&I issued six (6) refusals on the permit for Sign D. (Notices of Refusal of Permit).

5. On April 8, 1999 Applicant filed four (4) separate appeals of the refusals to the Zoning Board. Subsequently, Applicant's appeals were consolidated, and a single public hearing was held before a quorum of the Zoning Board's members on May 12, 1999. (Petitions of Appeal to the Zoning Board; N.T. at 1).

6. On June 23, 1999, a majority of the Zoning Board's members voted to grant Applicant four (4) variances, one for each proposed outdoor advertising sign. (Notice of Decision).

7. The subject property is a narrow strip of land, measuring 2,700 feet in length and approximately 55 feet in width, with the length of the property lying in an east-to-west orientation. It is zoned Recreational. Applicant is the legal owner of the subject property having acquired the property

from the Penn Central Transportation Company in March of 1979. (Applications for Zoning and/or Use Registration Permit Nos. 990326004, 990326005, 990326006, 990326007, Applicant's Exhibit A-11; N.T. at 10; N.T. at 16; Deed, Applicant's Exhibit A- 1).

8. Three (3) sets of railroad tracks span the length of the subject property, dissecting it in half. The tracks are currently used by Applicant, and there are no future plans to discontinue their use. (N.T. at 28; N.T. at 43; N.T. at 62; Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9).

9. The subject property is located south of the I-95 (a/k/a Delaware Expressway) and to the west of Broad Street. The surrounding area is comprised of recreational and industrial properties. (Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9).

10. Located directly to the north of the subject property is the Franklin Delano Roosevelt Park ("FDR Park"), a large recreational area located in the southern region of the City of Philadelphia. The park is zoned Recreational and is owned by the City of Philadelphia. FDR Park is under the jurisdiction of both the Fairmount Park Commission and the City of Philadelphia Department of Recreation. The park provides several recreational amenities, including a museum, tennis courts and numerous athletic fields. Also used by the visitants to FDR Park is a lake situated approximately in the middle of the park. (Applications for Zoning and/or Use Registration Permit Nos. 990326004, 990326005, 990326006, 990326007; N.T at 20;

N.T. at 29; N.T. at 31-33; N.T. at 57; Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9).

11. Dissecting the southern portion of FDR Park is I-95. This major traffic artery runs parallel to the subject property. I-95 is elevated at this section and has both an egress ramp and an ingress ramp which allow automobiles to access the highway. FDR Park extends underneath I-95's road surface. The portion of the park lying directly beneath I-95 is used as a parking area and as a recreational area for skateboarders and cyclist. (N.T. at 19; N.T, at 30; Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9; *Inquirer* News Article, Applicant's Exhibit A-16).

12. The subject property also cuts across the southern portion of FDR Park. This creates a "sandwiching" effect. The subject property is surrounded by portions of FDR Park directly to the north and to the south. (N.T. at 18; N.T. at 43; Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9).

13. The portion of FDR Park located directly to the south of the subject property, although zoned Recreational, appears not to be used for such a purpose. Existing on the property are several open air parking lots and an industrial/commercial type structure. Directly abutting this portion of FDR Park to the south is the site of the former United States Naval Yard. Several naval ships are still docked in the yard's port. (N.T. at 18; N.T. at 43, Zoning Map,

Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9).

14. The portion of FDR Park located directly to the north of the subject property is intersected by the Hollander Creek Culvert which gives the land a dual nature. The eastern portion of the property is covered by scrub vegetation and debris. However, the western portion is covered by a woodland. Situated between this portion of FDR Park and the subject property is a fence. However, portions of the fence are missing so access between the subject property and the park is unconstrained. (N.T. at 30; N.T. at 45; N.T. at 55; N.T. at 69; Zoning Map, Applicant's Exhibit A-8; Aerial View Map, Applicant's Exhibit A-9; Applicant's Site Plans, Applicant's Exhibit A-6).

15. Located directly west of FDR Park is the Philadelphia Solid Waste Transfer station and a large petroleum tank farm. (N.T. at 59; Aerial View Map, Applicant's Exhibit A-9).

16. Located to the east of FDR Park is the City of Philadelphia's Stadium District. (Aerial View Map, Applicant's Exhibit A-9).

17. Applicant proposes to erect on the subject property four (4), double-faced, "V" shaped, non accessory, outdoor advertising signs: Signs A, B, C and D. The signs would be positioned in a horizontal row across the length of the property with Sign A located furthest to the west and Sign D located furthest to the east. The proposed distance between each sign would be approximately 587'. Each of the signs'

faces would measure 14' in height and 48' in width. (Applicant has reduced the dimensions from its original proposal.) The proposed total sign area for each outdoor advertising sign would be [2 x (14 x 40)] 1,120 square feet. (Applications for Zoning and/or Use Registration Permit Nos. 990326004, 990326005, 990326006, 990326007; Applicant's Site Plans, Applicant's Exhibit A-6; N.T. at 20).

18. Applicant proposes to locate Sign A within 500 feet of FDR Park. (Applicant's Site Plans, Applicant's Exhibit A-6).

19. Applicant proposes to locate Sign B within 500 feet of FDR Park and within 500 feet of an ingress and an egress ramp to I-95. (Applicant's Site Plans, Applicant's Exhibit A-6).

20. Applicant proposes to locate Sign C and Sign D within 300 feet of an ingress and an egress ramp to I-95 and within 500 Feet of FDR Park. (Applicant's Site Plans, Applicant's Exhibit A-6).

21. Applicant proposes to advertise solely to the vehicular traffic on I-95. In order to accomplish this goal, Applicant proposes to position the apex for each "V" shaped sign towards FDR Park, which would angle the proposed signs' faces almost perpendicular to I-95. In addition, Applicant proposes to support the outdoor advertising signs on separate monopole structures, each measuring 46 feet in height. This would position the bottom of the proposed signs twenty-five (25) feet above I-95's elevated road surface, thereby allowing the passing motorists to view the

advertisements. (Applicant's Site Plans, Applicant's Exhibit A-6; N.T. at 21-22).

22. Currently existing on the subject property is a freestanding non accessory sign. (The dimensions for this existing sign were not provided to the Zoning Board.) The existing sign is located at the far West end of the subject property and would be situated approximately 589 feet from Sign A's proposed location. (N.T. at 16, Applicant's Site Plans, Applicant's Exhibit A-6).

23. Applicant proposes not to remove from any of its properties located in the City of Philadelphia an existing sign of equal or greater size than the proposed outdoor advertising signs'. (Applications for Zoning and/or Use Registration Permit Nos. 990326004, 990326005, 990326006, 990326007).

24. Since 1991, Applicant has removed over thirty (30) signboards from its various properties located throughout the City of Philadelphia. (Applicant did not provide the dimensions of the signs that have been removed.) In addition, Applicant has not erected a single outdoor advertising sign on any of its properties located in the City of Philadelphia since 1991. (N.T. at 64-67, Memo from Bob Orlando, Applicant's Exhibit A-12).

25. Applicant proposes to illuminate the four (4) proposed outdoor advertising signs. The illumination would be mounted below each sign and would be focused on the signs faces only. In addition, Applicant proposes that the signs would be non-flashing, non-revolving and not

intermittently illuminated. (Applicant's Site Plans, Applicant's Exhibit A-6).

26. Albert Tantala, a licensed engineer, opined that the proposed outdoor advertising signs would not be visible to the visitors to FOR. Park. Mr. Tantala explained that because the signs' apexes would be pointed towards the park, if viewed from a distance, the signs would appear as "dots on the horizon" and would blend into the background with the naval ships' tall masts. If viewed up close, the elevation of the proposed signs would cause them to disappear from view. Mr. Tantala further opined that the subject property's zoning classification was erroneous because the property is privately owned and not under the jurisdiction of the Fairmount Park Commission, the City of Philadelphia Department of Recreation or the U.S. Department of Forestries. Mr. Tantala further opined that the subject property should be zoned either Least Restrictive or General Industrial. (N.T. at 24; N.T. at 31-32).

27. Joseph Bucovetsky, a certified land use and planner, opined that to require the subject property to be used as a recreational property would be improper. Mr. Bucovetsky explained that the recreational use of the subject area ceases at the point where I-95 intersects FDR Park. Mr. Bucovetsky agreed with Albert Tantala that that property's zoning classification should be changed to reflect its current use. In addition, Mr. Bucovetsky agreed that the proposed signs would have no negative impact on the subject property or the surrounding area. (N.T. at 50-53; Report prepared by Joseph Bucovetsky, Applicant's Exhibit A-15).

28. The Zoning Board heard and considered testimony from various taxpayers and residents of the City of Philadelphia in opposition to Applicant's proposals: John Grady, Vice President of Philadelphia Industrial Development Corporation, Stepharde Andrews, representative for Friends of Philadelphia Parks; Judith Ingram, representative for Center City Residents Association; John Strueble; Mary Tracy, President of Society Created to Reduce Urban Blight. The Board notes that not one of these Protestants resides in the vicinity of the subject area. (N.T. at 71-90).

29. The Zoning Board has received and considered a report from Tantala Associates regarding the impact outdoor advertising signs have on traffic safety. The report indicates that there is no correlation between outdoor advertising signs and traffic safety. (Traffic Study Report from Tantala Associates, Applicant's Exhibit A-14).

30. The Zoning Board has received and considered various letters from community leaders and associations in opposition to Applicant's proposals. (Letter from Robert Jaffe, Special Counsel to Councilman-At-Large David Cohen, dated June 21, 1999; Letter from Council President Anna Verna dated May 25, 1999; Letter from Friends of F.D.R. dated May 19, 1999; Letter from SCRUB dated May 11, 1999; Letter from the Philadelphia Industrial Development Corporation dated May 11, 1999).

31. The Zoning Board has received and considered a written report prepared by Gray Smith, an architect and urban planning consultant, in opposition to Applicant's proposals. The Board notes that Mr. Smith did not appear at the public

hearing to testify, and therefore, the facts and opinions in his report were never subjected to cross examination. (Analysis and Opinion Report prepared on June 10, 1999 by Gray Smith's Office).

32. The Zoning Board has received and considered a letter from the Fairmount Park Commission. The Commission indicates in its letter that according to Fairmount Park regulations, any proposed outdoor advertising signs, which would be located within close proximity to Fairmount Park property, must be reviewed for esthetic impact. The Commission further indicates that it has not been provided such an opportunity concerning Applicant's proposed signs, and therefore, until such review takes place, it has concerns over the placement of the proposed signs. (Letter from William Mifflin dated May 11, 1999).

33. The Zoning Board has received and considered a letter from Barbara J. Kaplan, Executive Director of Philadelphia's City Planning Commission recommending that Applicant's requested variances not be granted. (Letter dated May 11, 1999).

CONCLUSIONS OF LAW

1. The subject property is zoned Recreational. The Zoning Code permits a property zoned Recreational to be used only for a recreational use or activity. Section 14-701(2). The Code does not provide a definition for the term "recreational." However, *Webster's Third New International Dictionary (Unabridged)* defines the term as being "equipped so as to provide diversions or amusements." Clearly, outdoor

advertising signs are not equipped to provide diversions or amusements, and therefore, Applicant's proposal to erect four (4) outdoor advertising signs on the subject property does not conform to the use requirement for a Recreational property.

2. The Zoning Code prohibits an outdoor advertising sign to be located within 660 feet of all ingress and/or egress ramps of I-95 (a/k/a Delaware Expressway). Section 14-1604(9)(b). Applicant proposes to locate Sign B within 500 feet, and Sign C and D within 300 feet, of an egress ramp and an ingress ramp of I-95. Therefore, Applicant's proposal does not conform to this outdoor advertising regulation.

3. The Zoning Code prohibits an outdoor advertising sign to be located within 660 feet of any park under the jurisdiction of the Fairmount Park Commission. Section 14-160a(9)(m). Applicant proposes to locate Sign A, B, C and D within 500 feet of FDR Park, a park under the jurisdiction of the Fairmount Park Commission. Therefore, Applicant's proposal does not conform to this outdoor advertising regulation.

4. The Zoning Code prohibits an outdoor advertising sign to be located within 660 feet of any park or recreational facility under the jurisdiction of the City of Philadelphia Department of Recreation. Section 14-1604(9)(n). Applicant proposes to locate Sign A, B, C and D within 500 feet of FDR Park, a park under the jurisdiction of the City of Philadelphia Department of Recreation. Therefore, Applicant's proposal does not conform to this outdoor advertising regulation.

5. The Zoning Code requires that as a condition for the issuance of a permit to erect an outdoor advertising sign, an existing sign encompassing equal or greater sign area shall be removed by the applicant. Section 14-1604(10)(a). Applicant's proposals do not include removing any existing signs from any of its properties located throughout the City of Philadelphia. The Zoning Board rejects Applicant's assertion that it has satisfied this regulation by removing thirty (30) signs previously from its property. Applicant failed to provide the dimensional measurements for these previously removed signs, and thus; the Board cannot presume that the signs were of a sufficient size to satisfy the regulation's requirements. Therefore, Applicant's proposal does not conform to this outdoor advertising regulation.

6. The Zoning Code mandates that no more than two (2) sign faces shall be permitted on any one lot and that no more than one (1) support structure shall be permitted on any one lot. Section 14-1604(7). Applicant proposes to erect on the subject property a total of eight (8) sign faces and a total of four (4) sign support structures. Therefore, Applicant's proposal does not conform to this outdoor advertising regulation.

7. The Zoning Code mandates that the maximum sign area of any outdoor advertising sign shall be 1,500 square feet per sign support structure. Section 14-1604(5)(b). Applicant proposes to erect double-faced signs on each support structure. Applicant has agreed to reduce the proposed area for each sign face to 560 square feet (14' x 40'). Hence, Applicant proposes to have a total sign area of only 1,120 square feet (2 x 560) for each support structure. Therefore,

Applicant's proposal does conform to this outdoor advertising regulation.

8. Accordingly, for all the reasons stated above, Applicant's proposals may be permitted only if the criteria for granting a variance are met.

9. To establish entitlement to a zoning variance, an applicant must show an unnecessary hardship resulting from the property's unique physical conditions or circumstances; that such hardship is not self-imposed by the applicant; that granting the variance would not adversely impact the public health, safety or welfare; and that the variance, if authorized, would represent the minimum variance necessary to afford relief. City of Philadelphia Zoning Code at Section 14-1802(1); *Alpine Inc v. Abbington Tp. Zoning Hearing Board*, 654 A.2d 186 (Pa. Commw. Ct 1995); *Carman v. Zoning Board of Adjustment of the City of Philadelphia*, 161 Pa. Commw. 80, 638 A.2d 365 (1994).

10. The Zoning Board concludes that Applicant has met the requirements for granting a variance. The Board agrees with Applicant's position that the zoning classification for the subject property is improper. As set forth in the Zoning Code at Section 14-701(1) parcels of public [emphasis added], land under the jurisdiction of the City of Philadelphia Department of Recreation, Fairmount Park Commission, the Department of Forests and Waters of the Commonwealth of Pennsylvania, and the National Park Services of the United States may be designated as a Recreational District. Clearly, the subject property does not met the Code's requirements for a Recreational zoning designation. First and foremost, the

property is not public land. It is privately owned by Applicant. Second, the property is not under the jurisdiction of any one of the above-mentioned government agencies. The error in the zoning classification is probably the result of a mistaken belief that Applicant did not own the subject property, but instead had an casement. As a result, the zoning map's creators incorrectly included the subject property in FDR Park's zoning classification. The Board cannot begin to imagine how a railroad property with three (3) sets of active tracks could have otherwise been designated as Recreational. Who would want their children or family pets playing in such an area?

Despite the obvious error, as set forth at Section 14-1801(1) of the Zoning Code, the Board has no authority to change a property's zoning classification. However, the Board concludes that in the present ease the error in subject property's zoning does create an unnecessary hardship. In 1991, when Applicant originally applied to L&I for permission to erect the proposed outdoor advertising signs, Applicant may have been issued permits as a matter of right if the zoning classification for the subject property had not been improperly designated as Recreational. When Applicant attempted to rectify the error in zoning, additional regulations were added to the Code which have placed further restrictions on Applicant's proposals for the subject property. In other words, a bureaucratic nightmare has prevented Applicant from making full use of its property resulting in an unnecessary hardship.

12. The hardship presented are not self-imposed by Applicant; it is the result of the erroneous zoning,

classification for the subject property.

13. The variance is the minimum necessary to afford relief to Applicant.

14. Applicant has persuasively established that its proposals would not have a negative impact on the public health, safety and welfare. In particular, the Zoning Board is persuaded that the proposed outdoor advertising signs, due to their elevation and position, would not impede the view from FDR Park. In addition, the traffic study report establishes that the safety of persons driving on I-95 would not be jeopardized by the proposed signs.

15. For all of the foregoing reasons, the Zoning Board voted, at Calendar 98-0407, to grant a variance for the property located approximately 48 feet south of the South Row of I-95 and approximately 992 feet west of the West Building Line of Broad Street, Philadelphia, Pennsylvania.

Respectfully submitted,

/s/ _____

Robert J. D'Agostino
Administrator
Zoning Board of Adjustment

VOTE OF THE BOARD

THOMAS J. KELLY	YES
SUSAN O.W. JAFFE	NO
ROSALIE M. LEONARD	NO
THOMAS LOGAN	YES
DAVID AUSPITZ	YES

Findings of Fact and Conclusions of Law of the Zoning Board of Adjustment - 07/06/99

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

JULY TERM, 1999

NO. 3712

CITY OF PHILADELPHIA, LAW DEPARTMENT
CHERYL GASTON
DEPUTY CITY SOLICITOR
ATTORNEY IDENTIFICATION NO. 51192
1515 ARCH STREET-16TH FLOOR
PHILADELPHIA, PA 19102-1595
215/683-5116

SOCIETY CREATED TO REDUCE URBAN BLIGHT (SCRUB), et al.,
Appellants,

vs.

ZONING BOARD OF ADJUSTMENT OF THE CITY OF PHILADELPHIA AND THE CITY OF PHILADELPHIA,
Appellees.

TO THE PROTHONOTARY:

The enclosed file constitutes the completed record of the Zoning Board of Adjustment of the City of Philadelphia in connection with the above-captioned matter, which is being

filed with your office in accordance with Local Rule 320 and the Philadelphia Zoning and Planning Code, Title 14 of the Philadelphia Code, at § 14-1807.

STEPHANIE L. FRANKLIN-SUBER
CITY SOLICITOR

/s/ _____
CHERYL L. GASTON
Deputy City Solicitor

APPENDIX F

CONSTITUTIONAL PROVISIONS STATUTES and ORDINANCES

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENTS

AMENDMENT 5

USCS Const. Amend. 5 (2001)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENTS

AMENDMENT 14

USCS Const. Amend. 14, § 1 (2001)

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA

ARTICLE I. DECLARATION OF RIGHTS

§ 1. Inherent rights of mankind

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA

ARTICLE I. DECLARATION OF RIGHTS

§ 10. Initiation of criminal proceedings; twice in jeopardy; eminent domain.

Except as hereinafter provided no person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, or by leave of the court for oppression or misdemeanor in office. Each of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information filed in the manner provided by law. No person shall, for the same offense, be twice put in jeopardy of life or limb; nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.

PHILADELPHIA ZONING CODE

Section 14-701. Designation.

(1) Parcels of public land under the jurisdiction of the City of Philadelphia Department of Recreation, Fairmount Park Commission, the Department of Forests and Waters of the Commonwealth of Pennsylvania, and the National Park Service of the United States Government which are devoted to park and/or recreational purpose may be designated on the zoning maps as Recreational.[1]

(2) *Use Regulations.* The specific uses permitted in this district shall be the erection, construction, alteration, or use of buildings and/or land for any type of recreational use or activity; provided, that any private operation for private profit located within this district at a distance of 500 feet or less from any district boundary shall be permitted only if a certificate from the Zoning Board of Adjustment is obtained.

(3) *Area and Height Regulations.* Where a Recreational District is in the same block with any other district, said Recreational District shall comply with the area and height regulations of the most restrictive district which abuts upon said Recreational District.

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[1] Amended, 1970 Ordinances, p. 513.

PHILADELPHIA ZONING CODE

§14-1604. Outdoor Advertising and Non-Accessory Advertising Controls.

(1) *Legislative Findings.* The Council finds that:

(a) Existing zoning controls have done little to prevent the City-wide proliferation of commercial outdoor advertising signs.

(b) The excessive number of commercial outdoor advertising signs contribute to visual clutter and detract from the aesthetic beauty of the City of Philadelphia.

(c) Such signs are commercial by nature and while they may be appropriately located in certain commercial and industrial areas, they do not belong within or in close proximity to residential neighborhoods.

(d) An examination of existing signs located in residential neighborhoods indicates a high concentration of beer, liquor and cigarette advertisements, particularly in close proximity to schools, playgrounds and parks.

(e) This pattern of sign placement would seem to indicate a conscious effort to promote the use of these products by children who attend neighborhood schools and use neighborhood recreation facilities. Therefore, such signs pose a

serious threat to the health and welfare of children in the City.

(f) The proliferation of commercial outdoor advertising signs contribute to the appearance of deterioration of commercial and industrial areas of the City and therefore negatively impact upon the economic viability of these areas.

(g) Said signs jeopardize public safety by distracting pedestrians and to a greater extent passing motorists, since these signs by their nature are erected in areas intended to be seen by drivers of motor vehicles.

(h) Regulation and removal of these signs will promote traffic safety by eliminating the hazards to pedestrians and motorists posed by distracting and confusing sign displays.

(i) Regulation and removal of these signs will enhance the aesthetic beauty of the City of Philadelphia by promoting signs which are harmonious with the streetscape and by eliminating signs which dominate or obscure views of the City.

(j) Regulation and removal of these signs will protect public and private investment, promote economic development and commercial revitalization.

(k) There are few, if any, circumstances under which the prohibition of these signs will render property valueless, result in unnecessary hardship or

otherwise meet the criteria for a variance stated in Section 14-1802.

(l) Similar reasons have caused the Council to bar most commercial outdoor advertising and commercial non-accessory signs along and/or within the following: the major gateway approaches and bridges leading to Center City; the Benjamin Franklin Parkway; the Vine Street Parkway; the Southwark and Main Street Manayunk National Historic Districts; and nine (9) commercial revitalization areas located throughout the City.

(m) Therefore, special sign controls amending Section 14-1604 by providing for the removal of unsightly, distracting signs and setting forth the requirements for acceptable signage are required to promote traffic safety, protect views, minimize sign pollution and protect the historic, cultural, aesthetic, and economic vitality of the City of Philadelphia.

(2) *Scope.* These controls shall apply to all areas of the City with special restrictions regulating size, height, illumination, distances from residences, spacing, prohibition and conditions for obtaining permits. These controls shall supplement all provisions of this Title.

(3) *Spacing Requirements.* In all areas of the City, outdoor advertising signs and non-accessory signs shall not be permitted within five hundred feet of any other outdoor advertising sign. This spacing requirement shall not apply to

on-premise or accessory signs, non-commercial signs, and highway directional signs.

(4) *Distances from Residentially-Zoned property.* No sign support structure or sign face shall be erected within three hundred feet of any residentially-zoned property.

(5) *Area Regulations.* The maximum sign area of any outdoor advertising sign shall be as follows:

(a) For frontages along a street or right-of-way which are less than sixty feet in width, one thousand square feet per sign support structure.

(b) For frontages along a street or right-of-way which are sixty feet or more in width, one thousand five hundred square feet per sign support structure.

(6) *Height Regulations.*

(a) The bottom edge of any outdoor advertising sign shall not be located more than twenty-five feet above the road surface from which the advertising message is visible and further provided, that in no case shall the sign extend more than twenty feet in height above its bottom edge.

(b) When an outdoor advertising sign is to be erected such that it would be located within one hundred fifty feet of two (2) or more street, road, highway or bridge surfaces, the maximum height of an

outdoor advertising sign shall be measured from the surface with the lowest grade elevation.

(c) Where other provisions of The Philadelphia Code are more restrictive than this Section in terms of height regulations, the more restrictive height regulations shall apply for outdoor advertising and non-accessory signs whether such signs are free standing or roof signs.

(7) *Sign Face Regulations.* No more than two (2) sign faces or advertising messages shall be permitted on any one (1) lot; provided, that no more than one (1) sign support structure shall be permitted on any lot.

(8) *Illuminated, Animated, Flashing, and Revolving Sign Regulations.*

(a) Signs may be illuminated; provided, that the illumination shall be focused upon the sign itself, so as to prevent glare upon the surrounding areas.

(b) Flashing signs, signs with intermittent illumination, or signs with mechanically or electronically changing messages shall neither be erected within five hundred feet of any residential district, nor face any residential district within one thousand feet of the sign.

(c) Signs which revolve shall require a certificate from the Zoning Board of Adjustment.

(9) *Prohibited Areas.* Outdoor advertising signs and non-accessory signs shall be prohibited:

(a) Within six hundred sixty feet of all the bridges over the Schuylkill River from the Girard Point Bridge northwestwardly to the Belmont Avenue Bridge;

(b) Within six hundred sixty feet of all ingress and/or egress ramps of the Delaware expressway (I-95), from the Bucks County Line to the Delaware County Line, and the Schuylkill expressway (I-76), between the Montgomery County Line and the Walt Whitman Bridge;

(c) Within six hundred sixty feet of the Benjamin Franklin parkway as defined by the Department of Streets;

(d) Between Twenty-third street and the Schuylkill River from the south side of Race street to Chestnut street;

(e) Between Twenty-fourth street and the Schuylkill River from Chestnut street to South street;

(f) East of Sixth street from South street to the south side of Race street;

(g) Between Sixth street and Delaware avenue from South street to Washington avenue;

(h) Within six hundred sixty feet of the outward edge of the right-of-way lines as defined by the Department of Streets, of the Delaware expressway between Washington avenue and Oregon avenue;

(i) Within six hundred sixty feet of all the bridges over the Delaware River from the Walt Whitman Bridge to the Tacony-Palmyra Bridge;

(j) Within six hundred sixty feet of the outward edge of the right-of-way lines as defined by the Department of Streets, of Woodhaven road;

(k) Within six hundred sixty feet of the outward edge of the right-of-way lines as defined by the Department of Streets, of the Roosevelt boulevard;

(l) Within any area of the City designated as a local or national Historic District;

(m) Within six hundred sixty feet of the outward edge of any park under the jurisdiction of the Fairmount Park Commission, the Commonwealth of Pennsylvania, or the National Park Service;

(n) Within six hundred sixty feet of any park, playground, recreation center, play lot or other recreational facility under the jurisdiction of the Department of Recreation; and,

(o) Within six hundred sixty feet of any public or private pre-school, elementary, middle or high school.

(10) *Conditions For The Issuance of a Permit to Erect Outdoor Advertising and Non-Accessory Signs.*

(a) For each outdoor advertising and non-accessory sign erected in conformance with these provisions, an existing sign or signs encompassing equal or greater sign area shall be removed.

(b) The application to erect an outdoor advertising or non-accessory sign must specify the size and the location of the sign(s) to be removed. Sufficient proof of the physical existence of the sign(s) to be removed shall be supplied to the Department of Licenses and Inspections. Such proof may be in the form of permits and/or photographs of the existing sign(s).

(c) The application to erect an outdoor advertising or non-accessory sign must also be accompanied by a written authorization from the owner of the property where the sign(s) to be removed are located authorizing the applicant to remove said sign(s) and acknowledging that the right to maintain an outdoor advertising or non-accessory sign is being forfeited through the filing of the application and the issuance of the permit for the erection of the new sign.

(d) No permit for the erection of an outdoor advertising or non-accessory sign shall be

issued prior to actual removal of the sign(s) required to be removed as provided in subsections 10(a), (b), and (c) above.

(11) *Signs and Their Supporting Structures.*

(a) The supporting structures for outdoor advertising and non-accessory signs shall conform to the definition of a structure as set forth in Section 14-102(54), shall be considered as such and shall conform to all the requirements regarding structures contained in this Title, provided that Section 14-104 shall not apply to outdoor advertising signs and their structures and therefore such signs may not be extended or reconstructed pursuant to Section 14-104(1) through (13).

(b) Outdoor advertising and non-accessory signs shall be considered as the main use of a property and as a main structure and not as an accessory or ancillary use.

(12) *Removal and Maintenance of Nuisance, Unlawful and Prohibited Signs.*

(a) Nothing in this section is intended to prohibit the Department of Licenses and Inspections from removing a sign at any time without compensation which has been determined to be a public nuisance or unlawfully in existence under any other provision of The Philadelphia Code.

(b) A prohibited sign shall be maintained in good condition, but it shall not be structurally altered so as to enlarge or extend the area or height of the sign. However, a prohibited sign shall not be reconstructed if for any reason it becomes necessary to replace the entire sign, including the sign face, the frame and any supporting mechanism, but excluding the foundation.

(13) *Enforcement.* Whenever any sign is erected, altered, used or maintained in violation of this Section, the Department of Licenses and Inspections shall have the authority to enforce and direct compliance with the provisions of this Section as provided in Section 14-2020.

(14) *Penalties.* In addition to any other sanction or remedial procedure provided, the penalty for violation of any provision of this Section shall be a fine not exceeding one hundred fifty ($150) dollars for each offense, and may include imprisonment not exceeding thirty (30) days if the fine is not paid within ten (10) days. Continuous violation of the same provision shall be a separate violation for each day.

(15) *Severability.* If any provision, sentence, clause, section or part of this Ordinance is for any reason found to be unconstitutional, illegal, or invalid, such unconstitutionality, illegality or invalidity shall not effect or impair any of the remaining provisions, sentences, clauses, sections or parts of this Ordinance. It is the intent of the City Council that this Ordinance would have been adopted had such unconstitutional, illegal or invalid provision, sentence, clause, section or part thereof not been included herein.

PHILADELPHIA ZONING CODE

§14-1802. Criteria for Granting Variances.

(1) The Zoning Board of Adjustment shall consider the following criteria in granting a variance under §14-1801(1)(c):

(a) that because of the particular physical surrounding, shape, or topographical conditions of the specific structure or land involved, a literal enforcement of the provisions of this Title would result in unnecessary hardship;

(b) that the conditions which the appeal for a variance is based are unique to the property for which the variance is sought;

(c) that the variance will not substantially or permanently injure the appropriate use of adjacent conforming property;

(d) that the special conditions or circumstances forming the basis for the variance did not result from the actions of the applicant;

(e) that the grant of the variance will not substantially increase congestion in the public streets;

(f) that the grant of the variance will not increase the danger of fire, or otherwise endanger the public safety;

(g) that the grant of the variance will not overcrowd the land or create an undue concentration of population;

(h) that the grant of the variance will not impair an adequate supply of light and air to adjacent property;

(i) that the grant of the variance will not adversely affect transportation or unduly burden water, sewer, school, park or other public facilities;

(j) that the grant of the variance will not adversely affect the public health, safety or general welfare;

(k) that the grant of the variance will be in harmony with the spirit and purpose of this Title, and

(l) that the grant of the variance will not adversely affect in a substantial manner any area redevelopment plan approved by City Council or the Comprehensive Plan for the City approved by the City Planning Commission.

(2) In addition to the criteria set forth in §14-1802(1), the Zoning Board of Adjustment shall also consider the following criteria when granting a variance under §14-1801(1)(c).

(a) that the grant of the variance will not create any significant environmental damage;

(b) that the grant of the variance will not significantly increase the danger of flooding;

(c) that the grant of the variance will not cause erosion, siltation or pollution that are significant;

(d) that the applicant will take reasonable means to minimize environmental damage during construction;

(e) that the applicant in developing the site will use reasonable countermeasures in order that the completed project will not create significant environmental damage;

(f) that because of the particular physical surroundings, shape, or topographical conditions of the specific structure or land involved, a literal enforcement of the provisions of this Title would result in unnecessary hardship;

(g) that the conditions upon which the appeal for a variance is based are unique to the property for which the variance is sought;

(h) that the variance will not substantially or permanently injure the appropriate use of adjacent conforming property.

(3) Where the property in question is situated within areas subject to flooding as provided in Section 14-1606, relating to Flood Plain Controls, the Zoning Board

of Adjustment shall consider the following criteria when granting a variance under Section 14-1801(1)(c):

(a) *Within the Floodway.* No variances may be issued which would result in any increase in flood levels during the Regulatory Flood.

(b) *Within the Floodway Fringe:*

(.1) that the grant of the variance will not significantly increase the danger of flooding.

(.2) that the grant of the variance will not endanger the loss of property, or the public health, safety or welfare.

(4) Where the property in question is situated within an area subject to the "Benjamin Franklin Parkway Controls," as provided in Section 14-1611, the Zoning Board of Adjustment shall consider the following criteria when granting a variance under Section 14-1801(1)(c):

(a) that the grant of the variance will not substantially alter historic views of the City Hall Tower or the Center City skyline; and,

(b) that no variance shall be granted to allow additional height in the case of an application which also requests a variance to exceed the permitted gross floor area.

(5) Where the property in question is situated within an area subject to the "Center City Height Controls" as provided in Section 14-1609, the Zoning Board of Adjustment shall consider the following criteria when granting a variance under Section 14-1801(1)(c):

(a) that the grant of the variance will not substantially alter historic views of the City Hall Tower or the Center City Skyline; and,

(b) that no variance shall be granted to allow additional height in the case of an application which also requests a variance to exceed the permitted gross floor area.

(6) In the granting a variance relating to the construction of wireless service towers, the Zoning Board of Adjustment shall consider all of the following criteria in addition to the other applicable criteria set forth in this §14-1802:

(a) Evidence of the lack of space on suitable existing towers, buildings or other structures to co-locate the proposed antenna, cells, microcells and the lack of space on existing tower sites to construct a tower for the proposed antenna within the service area;

(b) Whether the wireless service provided will be unable to provide wireless services without the tower site;

(c) Whether the application represents a request for multiple use of a tower or site, or use on a site contiguous to an existing tower site;

(d) Whether the application contains a report that other potential users of the site and tower have been contacted, and they have no current plans, to the best of their ability to determine, that could be fulfilled by joint use;

(e) Whether the application shows how the tower or site will be designated or laid out to accommodate future multiple users. Specific design features evaluated shall include but not be limited to height, wind loading, and coaxial cable capacity; and

(f) Whether the proposed tower is to be located in an area where it would be unobtrusive and would not substantially detract from aesthetic or neighborhood character or property values, due either to location, shape of the tower (such as an imitation pine tree tower) or to the nature of surrounding uses (such as industrial use), or to lack of visibility caused by natural growth, landscaping or other factors.

(g) Anything in §14-1802 to the contrary not withstanding, for purposes of wireless service towers only, hardship sufficient for the granting of a variance shall include the effect upon the applicant's ability to provide wireless service.

(7) The provisions of paragraphs (2), (3), (4), (5), and (6) shall be in addition to the criteria set forth in paragraph (1).

(8) The applicant shall have the duty of presenting evidence relating to the criteria set forth herein.

APPENDIX G

QUOTATIONS OF PORTIONS OF THE RECORD WHERE FEDERAL QUESTIONS WERE RAISED

Pursuant to Supreme Court Rules 14 (g)(i) and (i)(v), Petitioner provides the following pertinent quotations of specific portions of the record showing where federal questions were timely and properly raised in the court of first instance and in the appellate courts:

I. RECORD IN THE COURT OF FIRST INSTANCE: PHILADELPHIA ZONING BOARD OF ADJUSTMENT

MR. PRIMAVERA: Mr. Kelly, I have cases, which I will hand up, basically the argument is that this zoning classification is totally illegal and the law says that if you have a zoning classification -- and I don't hear any argument on this, it's totally illegal -- then either they have to pay just compensation because of the taking or because it's illegal the Zoning Board and the courts have to give what's called site specific remedies, which basically means that what we come in with in our application has to be approved.

This is not your typical variance and I'm not surprised that a lot of people don't know about it; but it's basically, in addition to the arguments we are making

under the variance criteria, we are saying legally where City Council has mistakenly zoned nonpublic property for recreation, that is a nullity and as a matter of law -- this property, therefore, as a matter of law, is unzoned. There is no zoning.

It's as if City Council had said, "This is not to be zoned."

And the courts say, in effect, "This application has to be approved."

(Notes of Testimony, May 12, 1999 Hearing, Philadelphia Zoning Board of Adjustment at 88-89).

MR. PRIMAVERA: If you read my memo of law and the cases which I will provide, this is, quite frankly -- not only are we requesting a variance under the rules governing variances, but this is what we call validity challenge to the ordinance, which under Pennsylvania law, we are entitled to bring at this hearing and that's why we are making this record.

We, categorically, take the opposite position, Ms. Leonard. We believe as a matter of law, Pennsylvania law requires that we come into the Zoning Board and identify this mistake and have it rectified through the Zoning Hoard and/or the courts.

(Notes of Testimony, May 12, 1999 Hearing, Philadelphia Zoning Board of Adjustment at 25-26).

it's part of the park; but as you will hear, this property is zoned recreational, but it's owned by Conrail, it's not part of the park. In fact, it's not even adjoining, quote, unquote, a park use.

So we just wanted to do that for the record.

Again, we have handed up a package of exhibits which I've also given to opposing counsel. For the record, they all include the deed which shows that Conrail has owned the property since 1979 and it was previously owned by Penn Central.

(Notes of Testimony, May 12, 1999 Hearing, Philadelphia Zoning Board of Adjustment at 9-10).

. . . quite frankly, what you will see by way of illustration, the zoning code says that recreational zoning may only apply -- and these are the words of the ordinance -- to public land under the jurisdiction of either the City, the State or the Federal Government. Not only that, not only does it have to be publicly owned, but it has to be used for a park. Here the testimony will be absolutely uncontradicted that it's private property and it's not being used for a park. So, quite frankly, the zoning

is nullity and void, but that's legal argument.

(Notes of Testimony, May 12, 1999 Hearing, Philadelphia Zoning Board of Adjustment at 11-12).

Exhibit 11 is, an interesting packet of documents from L&I and the Zoning Board which interestingly enough shows that this was originally the subject of a zoning application in 1989, it was referred to the Zoning Board again because of this recreational miszoning. The Zoning Board took no action.

You will see in the packet a letter of support from then Councilwoman Verna - Conrail is here today, that it was their expectation that there would not be the need for a hearing on this because it was going to be rezoned, that obviously never happened and we are back 10 years later.

Had this been properly zoned, as you will hear testimony, in 1989, either LR which is adjacent with the Navy yard or G2 which is the adjoining property to the west toward the airport, there would have been no need for a hearing in 1989 because we would have been entitled to those permits as a matter of right.

So really our application is in the nature of turning back the clock and saying this has been mistakenly zoned since 1989 and had it been properly zoned in 1989,

permits would have been granted and these signs would have been up.

(Notes of Testimony, May 12, 1999 Hearing, Philadelphia Zoning Board of Adjustment at 12-13).

A. The only item of refusal in 1989 was that the property was zoned recreational.

Q. Had the property been zoned either G2 like the adjoining property to the west or LR like the adjoining property to the south, what would have been the result of those applications?

A. If the property were zoned lease restricted or G2, General Industrial 2, in 1989, those four permits would have been issued as a matter of right and as a matter of entitlement.

Q. We have referenced in the record your report which is dated March 8th and there's a blowup there.

Based upon your investigation into the property, based upon your review of the zoning code, without going into your entire report, which is in the record, can you tell us what you believe

is the case with regard to the classification of Conrail property, which you stated was being used for Conrail right-of-way purposes in order to get into the yard, which is to the north.

What is your professional opinion with regard to that zoning classification?

A. The Section 14-701, which is the definition of recreational districts, specifically states that it's public land under the jurisdiction of recreation -- Department of Recreation, Fairmount Park or the Department of Forestries of the United States, which are devoted to park and/or recreational purposes and are designed to be zoned on the zoning maps as recreational.

Because this is not owned by any unit of government, because it is not used as recreational, my opinion is that it should be zoned either LR or G2.

(Notes of Testimony, May 12, 1999 Hearing, Philadelphia Zoning Board of Adjustment at 23-24).

. . . or they can take the position, as we have also taken, that this improper zoning is a matter of law and results in the property being unzoned.

In which case, there is no zoning restriction or there is also an argument that can be made, if we turn the clock back to 1989 and had this property been properly zoned then, we would have had signs up. You will hear testimony from my other witnesses about the other signs that did go up in 1989 where the properties were properly zoned either industrial or lease restricted.

(Notes of Testimony, May 12, 1999 Hearing, Philadelphia Zoning Board of Adjustment at 27).

Q. Do you recall the applications which were submitted for these signs, but were refused because of the recreational nature of the zoning classification?

A. Yes.

Q. Was the property at that time or is the property now used for recreational purposes?

A. No.

(Notes of Testimony, May 12, 1999 Hearing, Philadelphia Zoning Board of Adjustment at 62).

Q. Is it your understanding that had this property been zoned either LR or G2 in 1989, permits would have been issued as a matter of right

for these four signs?
A. Yes.

(Notes of Testimony, May 12, 1999 Hearing, Philadelphia Zoning Board of Adjustment at 63).

II. RECORD IN THE APPELLATE COURT:COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

So what we are saying is that in conclusion, one, this is unzoned, which means anything that happens is in derogation of our protective property rights under the Pennsylvania Constitution.

Two, if you look at the Akron case, I do think we legally have the right to step back into our shoes, in 1989, prior to the '91 amendment, in which case if this had been zoned either G-2 or LR in '89, there would have been no 1604 overlay and we would have gotten our permits in our pocket. The record is clear as to that and I think Akron helps, us on that.

(Notes of Testimony, January 24, 2000 Hearing, Court of Common Pleas of Philadelphia County at 41-42).

THE COURT: Before I get to that issue, you help me, it is clear that this cannot be a recreational property. It is not properly zoned recreational. It is not a recreational property.

MR. STRETTON: Based on Mr. Tantala and –

THE COURT: Based on the fact that the law is very clear that a recreational property has to be public. This is not public.

MR. STRETTON: It would appear that's correct.

THE COURT: Let's assume for a second, as I do, that that is an incorrect designation and that the act is improper in that regard or the designation is improper.

Where does it leave it in terms of its zoning?

MR. STRETTON: It leaves it as a recreational zoning because they should have taken an appeal of that either back in '88 or back when they got the Zoning Board's decision.

The Zoning Board granted them a variance but the Zoning Board did not say

this is not zoned recreational.
In fact, the Zoning Board's Opinion in Finding of Fact number one said the subject matter is zoned recreational and -

THE COURT: That's true, it is zoned recreational. The question is is it properly zoned recreational.

MR. STRETTON: The Zoning Board said we don't have the authority to change that.

THE COURT: They don't but I do.

(Notes of Testimony, January 24, 2000 Hearing, Court of Common Pleas of Philadelphia County at 13-14).

It leads to a lot more interesting discussion because, clearly, under the terms of Philadelphia's own zoning ordinance, this is not, was not and cannot be recreational, and that's really not in dispute at all. I am comfortable saying that.

Your Honor has already hinted to the more difficult question, what does that mean, so I took the unusual step of going to the library because I wanted to make sure I knew what it meant.

We look at C&C Marine. I'm just passing up a whole list of cases. C&C Marine is a

fascinating case. I'll take the liberty of explaining it briefly.

A barge company decided to put together some docks and fix barges in the river. The barges were clanking and the noise and it was an industrial activity. The barges were right next to residentially zoned property. So the township borough issued a violation saying you don't have a zoning permit.

Well, the attorney for the barge owners and for the dock said you know what, your zoning maps don't address this area, and the Court said you know what, this is unzoned. You have not exercised your legislative power.

You know, zoning comes at the expense of personal property rights and it's basically all of the protection is in favor of the property owner, so if the Township missed the boat, either intentionally or unintentionally, no pun intended with these barges,

they basically have resulted in property which is no zoned, which means the private property rights are supreme, and that case is directly on point.

I will read briefly the point that I am trying to make here. "Our review of the zoning map shows that the Ohio River does not contain any dots or diagonal lines to indicate any type of zoning classification. Therefore, we must conclude that the borough has not used its zoning power to regulate that property." It's says "The restriction on the use of the property will not be extended by implication."

(Notes of Testimony, January 24, 2000 Hearing, Court of Common Pleas of Philadelphia County at 23-24).

Moving ahead to the argument about 1604, the billboards are permitted in LR and G-2 but there's a what I call spacing overlay that 1604 presents. You can't be so many feet from this, you can't be so many feet from that, and I think it's a complete Hertzberg analysis.

(Notes of Testimony, January 24, 2000 Hearing, Court of Common Pleas of Philadelphia County at 34).

So the first one that jumps out at us is B, C and D are within 660 feet. So that would be a 1604 dimensional Hertzberg consideration if you get that far under this whole analysis.

THE COURT: How far are they?

MR. PRIMAVERA: I forget the testimony, But they're pretty close, the idea being that we only have I think 50 feet of width. This is a very long, narrow site.

As a matter of fact, the testimony from the Conrail representative was do we physically have property that would allow us to be 660 feet away, and The answer was no. There's insufficient property to do that, and that's a hardship because we could not build these signs on a narrow piece of property where we don't have the right 660 feet away to put the signs.

THE COURT: But the question that raises in my mind from Hertzberg is if you are 659 feet

away, I think Hertzberg would speak to that.

Now, the question is how far away are they? Are they very far away? Are they very close?

MR. PRIMAVERA: They're very close.

THE COURT: Close to where?

MR. PRIMAVERA: They are close to the ramps.

(Notes of Testimony, January 24, 2000 Hearing, Court of Common Pleas of Philadelphia County at 36-37).

THE COURT: For the time being, let's eliminate that. Basically, we are talking about a dimensional problem.

MR. STRETTON: You are talking about decision. They drew a line, and that line though is --

THE COURT: We are talking about a dimensional problem, sir, in that regard. I don't know how that bites here. I know you don't want it to be a dimensional problem. You want it to be a prohibitive and look at their language and the reason for it.

MR. STRETTON: Dimensional would be if it

said sign X, two feet by five feet, and he wants to put 10 by 15. This says no signs within 660 feet and the park. I'm sorry, you understand the issues of law as well as anyone.

MR. PRIMAVERA: Suppose it said you have to have a 15 foot setback, Sam. Right. So it says no –

THE COURT: Sir, let me deal with the issue of whether Hertzberg made a change in this or not. I don't know.

(Notes of Testimony, January 24, 2000 Hearing, Court of Common Pleas of Philadelphia County at 47-48).

III. RECORD IN THE APPELLATE COURT: COMMONWEALTH COURT OF PENNSYLVANIA

Petitioner's federal questions were raised in, inter alia, the Statement of Questions Presented Section of its Brief before the Pennsylvania Commonwealth Court:

STATEMENT OF QUESTIONS PRESENTED

I. Whether the "Recreational" zoning classification of the property at issue in this matter is effectively a nullity because the property, by definition, cannot meet the

express requirements of the Philadelphia Zoning Code to be zoned Recreational.

Suggested Answer: Yes.
Answered in the affirmative by the Court of Common Pleas.

II. Whether requests for variances from the Zoning Code's limitations on placement of outdoor advertising signs should be analyzed under the standards for dimensional variances set forth by the Pennsylvania Supreme Court in Hertzberg v. Zoning Bd. of Adjustment, 554 Pa. 249, 721 A.2d 43 (1998).

Suggested Answer: Yes
Answered in the negative by the Court of Common Pleas.

(Petitioner's Brief before the Pennsylvania Commonwealth Court at 4). Petitioner further maintained in its Commonwealth Court Brief:

> As set forth in section 11 above, the Subject Property cannot be classified as Recreational because it is not public land but is held in fee simple by Conrail. Nonetheless, L&I refused the 1989 applications solely because of the improper designation of the Subject Property. Had it not been for this erroneous classification, the 1989 applications would have been granted as of right without the need

for variances, and Conrail would have erected the four signs over ten years ago.

Pennsylvania law provides that zoning regulations may not be imposed "on a landowner in the untrammeled use of his property," and the power to enact zoning regulations "does not extend to an arbitrary, unnecessary or unreasonable intermeddling with the private ownership of property." Landis v. Zoning Bd. of Adjustment of Hatfield Township, 414 Pa. 146, 149, 198 A.2d 574, 575 (1964). Further, zoning ordinances are in derogation of the common law and should be construed to afford landowners such as Conrail the broadest possible use and enjoyment of their property. Bakerstown Container Corp. v. Richland Township, 508 Pa. 628, 500 A.2d 420 (1985). The Pennsylvania Constitution also protects Conrail's right to the enjoyment of its private property, as landowners should be permitted to utilize their own land as they see fit. Pa. Const. Art. 1 § 1; see also Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

By L&I's refusal to issue the requested permits, Conrail was deprived of its right to use its property even though the Zoning Code allowed for such a use. This result is plainly contrary to Pennsylvania law since the Zoning Code allowed outdoor advertising signs to be placed on land such as the Subject Property.

Federal Question

> The erroneous classification of the Subject Property as Recreational has resulted in the type of "arbitrary, unnecessary [and] unreasonable intermeddling" the Supreme Court has held impermissible. The only reason Conrail has been unable to utilize the Subject Property as it chooses and in a manner consistent with the Zoning Code is because of the erroneous designation of the Subject Property as Recreational. It is clear that the Zoning Code is not intended to prevent landowners from using their property in a manner consistent with its express provisions. Nonetheless, the Zoning Code itself and the record evidence in the matter demonstrates that this is precisely what has happened with respect to Conrail's use of the Subject Property.

(Petitioner's Brief before the Pennsylvania Commonwealth Court at 20-21).

IV. RECORD IN THE APPELLATE COURT: THE SUPREME COURT OF PENNSYLVANIA

Petitioner's federal questions were raised in, inter alia, the Questions Presented Section of its May 29, 2001 Petition for Allowance of Appeal to the Pennsylvania Supreme Court:

Federal Question

QUESTIONS PRESENTED

***

2. Should the Court review the panel decision below, which directly contravenes this Court's recent liberalization of the standards governing the granting of use and dimensional variances?

3. Should the Court review the panel's refusal to consider any criteria except physical limitations on the Subject Property when determining whether a hardship warranting a zoning variance exists?

4. Should the Court review the panel decision below, which, by unreasonably denying zoning variances, infringes on property rights in violation of the Due Process provisions of the Federal and State Constitutions?

5. Should the Court reverse the panel's restrictions on private property use based entirely on a zoning classification that the panel itself concedes is incorrect?

(Petitioner's Petition for Allowance of Appeal to the Pennsylvania Supreme Court at 2). Petitioner argued that "the enforcement of the 'Residential' zoning designation that all have acknowledged is erroneous, and which City representatives stated would be changed, violates Conrail's

due process rights under the State and Federal Constitutions." (Petitioner's Petition for Allowance of Appeal to the Pennsylvania Supreme Court at 15-20).

Petitioner subsequently filed an Application for Reconsideration with the Pennsylvania Supreme Court on December 4, 2001, stating that the lower courts applied the wrong standard of unnecessary hardship to the dimensional variances in question and that "any action by the zoning board in reliance on the undisputedly erroneous zoning designation constituted a "regulatory taking" in violation of the federal and state constitutions." (Petitioner's Application for Reconsideration to the Pennsylvania Supreme Court at 5-7, 9-11).

Complete copies of the above notes of testimony, Petition for Allowance of Appeal, and Application for Reconsideration are included in the Appendix to this Petition for a Writ of Certiorari.

APPENDIX H

HEARING TRANSCRIPT
May 12, 1999

ZONING BOARD OF ADJUSTMENT
PUBLIC HEARING

In Re: 48 feet south of south row of I-95 and 992 feet west of the west building line of Broad Street, is in a recreational district; 405 feet west of the west line of Broad Street and 15 feet south of the south row of I-95 is in a recreational district; 406 feet south of south row of I-95, 1,579 feet west of Broad Street, is in a recreational district; 122 feet south of south row I-95, is in a recreational district.

Wednesday, May 12, 1999
Philadelphia, Pennsylvania

Hearing held pursuant to notice, taken at ZONING BOARD OF ADJUSTMENT, 1515 Arch Street, 18th Floor, on the above date, beginning at approximately 5:00 p.m., before N. Richard Roberts, a Court Reporter and Notary Public of the Commonwealth of Pennsylvania, there being present.

APPEARANCES:

PANEL MEMBERS:

THOMAS J. KELLY, CHAIRMAN
DAVID AUSPITZ
SUSAN O. W. JAFFE
ROSALIE M. LEONARD
THOMAS D. LOGAD

ALSO PRESENT:

CARL S. PRIMAVERA
Counsel for the Applicant

ROBERT JAFFE
Counsel for City Council and SCRUB

INDEX TO TESTIMONY

WITNESS	Direct	Cross	Redirect	Recross
Albert Tantala	15	28	33	37
Joseph Bucovetsky	41	54	59	- -
Robert Orlando	61	64	68	68
Stephanie Andrews	80	- -	- -	- -

INDEX OF EXHIBITS

HEARING EXHIBITS MARKED

(All documents were given to the Zoning Board.)

THE CHAIRMAN: Zoning board of adjustment will now come to order. So all rise and be sworn to give testimony.

* * *

...All potential witnesses sworn en masse...

* * *

THE CHAIRMAN: Calendars 99-0407, 99-0408, 99-0409, 99-0410, 48 feet south of Broad Street, 106 feet south of Broad Street, 122 feet south of Broad Street and 45 feet west of Broad Street.

MR. PRIMAVERA: For the record, Carl Primavera on behalf of the applicant, Conrail.

MR. JAFFE: For the record, Robert Jaffe, office of councilman at large, David Cohen, for opponents and I'm also here for Mary Tracy and SCRUB.

THE CHAIRMAN: The location 48 feet south of Broad, the application is for the erection of one free-standing, double-faced, V-shaped illuminated nonaccessory sign 20 feet by 60 feet with [5] 76 feet elevation to top of sign on same lot with rail line passing through League Island Park.

A nonaccessory sign is prohibited within 660 feet of a playground and/or Fairmount Park, within 660 feet of a recreational park, within 660 feet of an ingress/egress ramp

to I-95, and exceeds the permitted 1,500 square feet and not removing a sign of equal square footage is not permitted in a recreation district.

Six use refusals.

Note to Zoning Board, Fairmount Park Commission approval may be required.

Also note to Zoning Board, site plan indicates the proposed erection of a total of four signs on the railroad right-of-way filed under separate applications Section 14-1604 (7) states, "No more than two sign faces or advertising messages shall be permitted on any one lot; provided that no more than one sign support structure shall be permitted on any lot."

[6]

MR. PRIMAVERA- Mr. Kelly, may we proceed with all four at one time?

THE CHAIRMAN: We are going to and I will read them all into the record.

106 feet south of Broad Street, south row of 1-95.

The application is for the erection of a nonaccessory outdoor advertising sign, double-faced, V-shaped, 20 feet by 60 feet, 66 feet total height, bottom of sign 25 feet above the I-95 roadway surface and extending 20 feet above the bottom edge, with 2,400 square feet total on the sign support structure, located within 660 feet of ingress and/or egress ramps of I-95, within 660 feet of a park under the jurisdiction

of the Fairmount Park Commission, within 660 feet of a recreational facility under the jurisdiction of the Department of Recreation and not proposing to remove a nonaccessory sign of equal size.

Whereas, an outdoor advertising sign is not permitted in the district; [7] whereas, the sign area exceeds the maximum allowable area of 1,500 square feet per sign support structure; whereas, outdoor advertising signs are prohibited within 660 feet of ingress and egress ramps of I-95, within 660 feet of a park under the jurisdiction of the Fairmount Park Commission and within 660 feet of a recreational facility under the jurisdiction of the Department of Recreation; and whereas, an outdoor advertising sign of equal size is required to be removed.

Six use refusals.

There is an '89 calendar for the erection of a nonaccessory outdoor advertising sign, no decision is available.

Note to the Zoning Board, Fairmount Park Commission approval required prior to issuance of a permit.

The other note about the site is about the four signs that has a refusal also. On 122 south, there are five use refusals and on 405 feet west, there are [8] six use refusals, all with the same notations.

This one also has a notation that the proposed sign will advertise and will be visible to traffic on the Delaware Expressway.

Before we get started here, Counsel, everybody, Mr. Jaffe, I am talking to you especially.

MR. JAFFE: Yes, sir.

THE CHAIRMAN: Last week, the City was in here and was in opposition to a case, another billboard case, everything was conducted in an orderly manner with facts and nothing else and we are going to tolerate nothing else here tonight.

Present the case, all the facts and then we will make a decision.

Please, proceed, Mr. Primavera.

MR. PRIMAVERA: Thank you. Mr. Chairman. Members of the Board, I've provided opposing counsel with two copies of all of our exhibits, as well as our memo of law.

[9]

Two items I want to at least address for the record, the original proposal all called for the signs to be 20 by 60. We have unilaterally reduced them to 14 by 48 and we are stipulating to that reduced size.

Also, in the various refusals that have been read into the record, some of them talk about Fairmount Park Commission may be required, some say Fairmount Park will be required and some say Fairmount Park should be consulted.

We object to that reference, as you will hear, because we believe that reference mistakenly believes that because the property is zoned recreational, that it's part of the park; but as you will hear, this property is zoned recreational, but it's owned by Conrail, it's not part of the park. In fact, it's not even adjoining, quote, unquote, a park use.

So we just wanted to do that for the record.

Again, we have handed up a package [10] of exhibits which I've also given to opposing counsel. For the record, they all include the deed which shows that Conrail has owned the property since 1979 and it was previously owned by Penn Central.

MR. JAFFE: Can you point that out to me within the material.

MR. PRIMAVERA: Sure.

MR. JAFFE: Chairman Kelly, Robert Jaffe, I am asking to show a deed of ownership because it's quite common for railroads to only have an easement for rail use.

MR. PRIMAVERA: We will have affirmative testimony about the deed, but we do have that in our package. It is, in fact, part of the interesting history, that it's not a right-of-way or an easement, but it's fee simple. We have affirmative testimony with regard to that.

Exhibit 2 is a list of photographs.

Exhibit 3 is our combined list of four applications, because even though it's [11] one parcel, because it's configured as a right-of-way, we made four separate applications.

Exhibit 4 are the four refusals.

Exhibit 5 are the four petitions of appeal to the Zoning Board.

Exhibit 6 is the site plan prepared by Tantala, which actually includes the cover sheet that you are looking at and an individual sheet, one for each sign. They are accurate in all respects except that we are reducing it again from 20 by 60 to 14 by 48.

Exhibit 7 is the street plan from the Department of Streets.

Exhibit 8 is the zoning map.

Exhibit 9 is an aerial area photo.

Exhibit 10 is a report prepared by Tantala Associates dated 3/8/99, which you will hear testimony on; but, quite frankly, what you will see by way of illustration, the zoning code says that recreational zoning may only apply -- and these are the words of the ordinance -- to public land [12] under the jurisdiction of either the City, the State or the Federal Government.

Not only that, not only does it have to be publicly owned, but it has to be used for a park. Here the testimony

will be absolutely uncontradicted that it's private property and it's not being used for a park. So, quite frankly, the zoning is nullity and void, but that's legal argument.

There is also in the record a brief, which I have given to opposing counsel, supported by cases.

Exhibit 11 is an interesting packet of documents from L&I and the Zoning Board which interestingly enough shows that this was originally the subject of a zoning application in 1989, it was referred to the Zoning Board again because of this recreational miszoning. The Zoning Board took no action.

You will see in the packet a letter of support from then Councilwoman Verna -- Conrail is here today, that it was their [13] expectation that there would not be the need for a hearing on this because it was going to be rezoned, that obviously never happened and we are back 10 years later.

Had this been properly zoned, as you will hear testimony, in 1989, either LR which is adjacent with the Navy yard or G2 which is the adjoining property to the west toward the airport, there would have been no need for a hearing in 1989 because we would have been entitled to those permits as a matter of right.

So really our application is in the nature of turning back the clock and saying this has been mistakenly zoned since 1989 and had it been properly zoned in 1989, permits would have been granted and these signs would have been up.

The following exhibits are also in the record, Exhibit 12 is a memo dated 5/12/99 from TDI, which is a

representative for Conrail, talking about the number of signs that have been removed by them on Conrail property since the more recent 1991 [14] amendment to the zoning code.

Exhibit 13 is a letter from the Outdoor Advertising Association of America.

Exhibit 14 is a report from Tantala regarding the lack of any traffic impact with regard to billboards generally.

Exhibit 15 is a report from Norman Day and Associates, it's a land use report analysis dated 5/12/99. Mr. Bucovetsky is here today, who will, of course, spell his name for the record and also go through his report.

Again, we would also introduce a memo of law, our legal analysis of the facts which we believe should be somewhat uncontradicted as more of a legal argument than hopefully be the subject of a dispute.

First and foremost, although I've been sworn as a witness and I believe all the others have, I would like Mr. Tantala to state his name and address for the record.

MR. TANTALA: Albert M. Tantala, T-a-n-t-a-l-a, 4903 Frankford Avenue, [15] philadelphia 19124.

* * *

ALBERT M. TANTALA, having been previously sworn as a witness, was examined and testified as follows...

* * *

DIRECT EXAMINATION

BY MR. PRIMAVERA:

Q. Sir, how long have you been an engineer licensed by the Commonwealth of Pennsylvania?

A. Approximately 32 years.

Q. How long have you been known in the industry as having expert capability in the design of outdoor advertising signs that relate to the documents?

A. I have been designing wind-loaded structures for approximately 32 years.

Q. Are you familiar with the site in question, which is the Conrail property to the immediate south of I-95 in South Philadelphia?

A. Yes, sir, I am.

Q. Have you prepared the exhibit, which we've marked, I believe, Exhibit 6, which is the front piece, which shows the entire property and then the [16] adjoining sheets which show individual signs?

A. Yes, sir, I did and I am familiar.

Q. For the record, could you please describe the Conrail property and going into, if you are familiar with it by firsthand investigation, the ownership of the property, which

we've identified as the Conrail property, which is the subject of this hearing today.

A. Yes, sir. The property is a property that is highlighted and shown in yellow on Exhibit 6. The property is approximately 55 feet wide, it varies at certain points, and the length of the property is approximately 2,700 feet. The property is to the south of I-95. I-95 in this area is less or around 795 and it's to the west of Broad Street.

The four signs proposed are Signs A, B, C and D. There is an existing sign just to the west of this track and this sign is shown at this location. This existing sign is just off the continuing line of the 20th Street, former right-of-way. The first sign closest to that is Sign A and that sign is about 589 feet away from the existing sign.

[17]

Q. Mr. Tantala, just for the record, and for my own clarification, is it correct that Sign A is under Calendar Number 99-0409; B is under Calendar Number 99-0408; C is under Calendar Number 99-0407; and D is under Calendar Number 99-0410?

A. Yes, sir, it is.

Q. You were referring to the plan, if you are facing the plan head on and your title block is to the right, Broad Street would be the large street which is, in effect, perpendicular to I-95?

A. Yes, sir.

Q. You said that you were familiar with the ownership of the property designated in green on the plan as Conrail property?

A. Yes, sir. The legal description, the traverse of the track, as we show it, is from a deed which lists Conrail as the owner and that deed is dated circa 1979.

Q. Previously, before 1979, who was the owner of the property?

A. I am sorry, I don't recall that.

Q. In 1979 and up through today, what is the nature of the ownership, is it fee, is it an easement? From your investigation of the records [18] as an experienced engineer, what is the nature of the ownership interest of Conrail?

A. Fee simple ownership.

Q. Currently, if you were to go out there, as you have, what physically is seen in that fee that's described in this Exhibit 6?

A. On walking the track, it's railroad track, accessory area to the side of the railroad track, there is some ballast area.

Q. Is there any park area?

A. There's no park area used, there's no park area close to it.

Q. If we head to the south, can you tell me the nature of that property and the ownership of the property, just very briefly.

A. To the south is an undeveloped area, it's zoned recreational to this dashed line, which generally parallels the property line and to the south of that it's zoned LR, lease restricted.

Q. Is that the Navy base?

A. That is the former Philadelphia Navy base.

Q. Now, if we are heading north, immediately from the Conrail property, there seems to be something which is not owned by Conrail, it's from [19] the northerly line of Conrail's property to the I-95 overpass?

A. Between this Conrail property and between the I-95 property, there is a strip -- another strip of ground, which strip is a variable width, down close to nothing and backs to a variable width, and that ownership appears to be the City of Philadelphia.

Q. Is that being used for a park, from your own physical inspection?

A. No, sir, it is not.

Q. What does it appear to be used for?

A. It's just abandoned and no use at all.

Q. Is there any barrier between the City owned property to the north and the Conrail property to the south, a fence, a wall?

A. No fences, no walls. There is the former Hollander Creek and now the Hollander Creek culvert crosses over this.

Q. Briefly moving north, again, is the I-95 right-of-way which is elevated at this point?

A. There is I-95 and I-95 is elevated.

Q. Immediately to the north, again, can you tell me the owner of the property, the zoning [20] classification and the use.

A. To the north of I-95 is Roosevelt Park. Roosevelt Park is zoned recreational and, I believe, it's either owned by the City of Philadelphia or the Fairmount Park Commission.

Q. It's being used for recreational purposes?

A. Yes, sir, it is.

Q. With regard to the specific signs, by using the exhibits attached to Exhibit 6, could you tell us about the nature of those signs.

A. Each of the signs is a V-shaped sign, single pole. Each sign is 14 by 48, from left to right.

Sign A, which is shown on Exhibit 7. On Exhibit 7, the sign is approximately 2,166 feet away from Broad Street

and it's approximately 122 feet away from the right-of-way line; because the elevated I-95 is bifurcated at this point, the proposed signs are also.

The 14-by-48-foot signs are 472 square feet each. The bottom of Sign A is 25 feet from the roadway on the northbound direction and 25 feet from the road surface in the southbound direction.

[21]

Q. To whom would these signs advertise?

A. Each of the signs, A, B, C and D, is intended to advertise to the vehicular traffic on I-95.

Q. When you say they're V-shaped, can you tell me how the V is with regard to -- using I-95 as a reference.

A. I-95 going east and west at this sign, the V is represented by these two convex lines. The spread of the V is approximately in the order or magnitude of 15 or 20 feet.

Q. From the nature of the V, if we were to advertise to the park, which is not the intention of the plan you say, would that be an appropriate way to do it or would that be an inappropriate way to do it?

A. The way the signs are oriented, it's inappropriate that they would advertise to anyone in the park. To be looking perpendicular to it, you would be looking directly at the apex of the V. To be looking at it skewed from the other side, the

distance would be so great that most of the sign or all of the sign would be illegible.

Q. Can you just reference these for the [22] record, we won't go through them all due to the number of them; but I would just like to note for the record that you have done an analysis on a sign-by-sign basis of the criteria under the present code and either the satisfaction or the lack of satisfaction of that criteria on a sign-by-sign basis.

A. Each of the signs are not within 300 feet of any residentially-used or residentially-zoned property. Each of the signs is not within 500 feet of any existing or proposed nonaccessory signs. Each of the signs is not within 600 feet of any bridges across the river.

Sign A is not within 660 feet of any ramp or access ramp road.

Signs B, C and D are within 660 feet and they are within 660 feet of what PennDOT identifies as Ramp A and Ramp C.

Sign A is not within 660 feet of that ramp. Signs B, C and D are within 660 feet of Ramp A and Ramp C.

Q. These are traditional or conventional outdoor advertising signs typical to others seen on the major traffic arteries in and around the City [23] of Philadelphia?

A. Yes, sir.

Q. If we may, taking you back in time, are you familiar with the 1989 application submitted on behalf of Conrail to the Department of Licenses and Inspections and the Zoning Board?

A. Yes, sir. I made the 1989 application. It was the application for the very same four signs and the very same four locations.

Q. At the time in 1989, when the applications were submitted, what was the reason that L&I refused to grant a permit, if you are familiar with that?

A. The only item of refusal in 1989 was that the property was zoned recreational.

Q. Had the property been zoned either G2 like the adjoining property to the west or LR like the adjoining property to the south, what would have been the result of those applications?

A. If the property were zoned lease restricted or G2, General Industrial 2, in 1989, those four permits would have been issued as a matter of right and as a matter of entitlement.

Q. We have referenced in the record your [24] report which is dated March 8th and there's a blowup there.

Based upon your investigation into the property, based upon your review of the zoning code, without going into your entire report, which is in the record, can you tell us what you believe is the case with regard to the classification of Conrail property, which you stated was being used for Conrail right-

of-way purposes in order to get into the yard, which is to the north.

What is your professional opinion with regard to that zoning classification?

A. The Section 14-701, which is the definition of recreational districts, specifically states that it's public land under the jurisdiction of recreation -- Department of Recreation, Fairmount Park or the Department of Forestries of the United States, which are devoted to park and/or recreational purposes and are designed to be zoned on the zoning maps as recreational.

Because this is not owned by any unit of government, because it is not used as recreational, my opinion is that it should be zoned either LR or G2.

[25]

MS. JAFFE: Why didn't anybody make any effort over the last 10 years to have it rezoned? If you were involved in 1989, I assume Conrail was the owner at that point. I mean, why not?

THE WITNESS: Ma'am, I don't know, but there's another witness from TDI which represents Conrail and that's an appropriate question for him.

MS. LEONARD: You understand it's not our department to decide whether or not it's zoned properly, that's a different department that does that.

THE WITNESS: Correct.

MS. LEONARD: We can't make that determination. So we have to go by as it's zoned here on the refusal.

MR. PRIMAVERA: If you read my memo of law and the cases which I will provide, this is, quite frankly-- not only are we requesting a variance under the rules governing variances, but this is what we call validity challenge to the ordinance, which under Pennsylvania law, we are entitled to bring at this hearing and that's why we are making this record.

We, categorically, take the opposite position, Ms. Leonard. We believe as a matter of law, Pennsylvania law requires that we come into the Zoning Board ind identify this mistake and have it rectified through the Zoning Board and/or the courts.

Anticipating the testimony, you will see in the packet the letter from Councilwoman Verna back in 1989 in support of these, it's the testimony that everyone thought that this was going to be rezoned and it would go away and then, quite frankly, for whatever reasons left in the political process, it never happened.

So, in effect, we now have been waiting a reasonable period of time, if not more than reasonable, and have no other avenue other than to come in and start the process.

If we were to file a direct appeal against the City, the courts would say no, [27] you have to go -- either the Zoning Board can grant a variance because this is our hardship or they can take the position, as we have also taken, that this

improper zoning is a matter of law and results in the property being unzoned.

In which case, there is no zoning restriction or there is also an argument that can be made, if we turn the clock back to 1989 and had this property been properly zoned then, we would have had signs up. You will hear testimony from my other witnesses about the other signs that did go up in 1989 where the properties were properly zoned either industrial or lease restricted.

So this has, in effect, been a problem that has not gone away over the passage of time and we refer you to those exhibits, I believe it's Number 11, which are the records from the prior applications.

I have no further questions of Mr. Tantala.

[28]

MR. JAFFE: I have a few questions for Mr. Tantala.

CROSS-EXAMINATION

BY MR. JAFFE:

Q. Mr. Tantala, can you show me where the rail lines are for clarification on the map.

A. The yellow strip going from right to left on Exhibit 6 is the ownership of the property. The Conrail rails are generally to the southern portion of this strip.

Q. So they overlap the yellow area?

A. They are completely within the yellow area.

Q. To the best of your knowledge, aren't the rail lines fully utilized?

A. To the best of my knowledge, those rail lines are active lines.

Q. Could you tell me where a fence is located that goes along the track rights of the Conrail line, could you point it out on the map.

A. No, sir, I can't.

Q. Are you saying -- have you visited this site in person, sir?

A. Yes, sir, I did.

Q. Are you telling me you didn't see a metal [29] fence that goes along the tracks?

A. I am saying I don't remember a fence, yes, sir.

Q. Are you familiar -- would it surprise you to know that there is, in fact, a fence that borders the rail line in order to keep people from wandering on the highly-used double track of the Conrail line?

A. It wouldn't surprise me if the fence were there or were not there.

Q. Are you familiar with FDR Skate Park?

A. Yes, sir.

Q. Can you point it out on the map, please.

A. I believe that's in this area underneath the highway.

Q. Are you familiar with what FDR Skate Park is used for?

A. Generally skateboarding, yes, sir.

Q. Are you familiar that it's basically adolescents that play on skateboards on concrete structures at the skate park?

A. That's what I did see there, yes, sir.

Q. You are familiar that the people who play at the skate park also go onto the land that is the [30] triangular land that is in between the yellow and I-95?

A. No, sir, I am not familiar with that.

Q. Would it surprise you that there is no barrier other than the fence that borders along the yellow mark and that the triangular line is part of the play area of FDR Skate Park?

A. It would not surprise me, no, sir.

Q. Would it not surprise you to know that this triangular area that you stated is abandoned is, in fact, part of the play area of the FDR Skate Park used by adolescents in

Philadelphia in order to move them from Love Park in Center City?

A. From my observation of the triangular area, it does not appear to be part of the park land.

Q. You don't remember the fence that is there?

A. Correct, I don't.

MR. JAFFE: Board, I would like to ask that we keep the record open in order so that we could submit - -

MR. PRIMAVERA: We have other witnesses that will go into this with photographs and everything.

MR. JAFFE: That the record be kept [31] open so that I can submit photographs and expert testimony to the location of FDR Skate Park, the location of the fence and the use of this land.

THE CHAIRMAN: Sir, photographs and documentation, there will be no more testimony after tonight.

MR. JAFFE: Written submission only.

THE CHAIRMAN: That will be fine.

BY MR. JAFFE:

Q. Would you agree that these signs, despite your best efforts, will be partially visible from Roosevelt Park?

A. Yes, sir. The signs will be partially visible from portions of Roosevelt Park.

Q. Are you familiar with the pond and the lake area that is part of the park?

A. Yes, sir, I am.

Q. Are you familiar with the steps and the ornate concrete and stone structure that surrounds the beautiful lake in the middle of FDR Park?

A. Yes, sir, I did see that.

Q. Are you familiar that the elevation is [32] raised so that someone standing on the ornate structure of the park is going to be able to be more easily -- in a better view of the sign that you put up?

A. Yes, sir; I am aware of that.

Q. So your statement that most or all the signs will be illegible would not be correct because the signs will be seen and will be legible from the park?

A. I believe that the signs will be legible from portions of the park. I believe that if raising oneself in elevation within a park from whatever point, that the distance from that individual to the face of certain signs will not make them any more legible.

Q. Are you familiar with play areas that are within FDR Park?

A. I thought I was, yes, sir.

Q. You are familiar that there are athletic fields?

A. Yes, sir.

Q. Tennis courts?

A. Yes, sir.

Q. Picnic areas?

-[33]

A. Yes, sir.

Q. A bandstand?

A. Yes, sir.

Q. There's boating?

A. I did not see that, sir.

Q. There's fishing?

A. Yes, sir.

Q. There's a museum?

A. Yes, sir.

Q. These public uses would be with the view of the signs in the background?

A. Yes, sir.

MR. JAFFE: Thank You.

REDIRECT EXAMINATION

BY MR. PRIMAVERA:

Q. Mr. Tantala, in your testimony, you said that from certain positions in the park, that certain portions of the signs of one or more may be visible.

In your opinion, having been in this business for so many years, what would be -- if you can categorize -- the nature of that visibility?

Would it be -- and I know it's hard [34] to do because you're going to collectively have to think of the park as 100 percent and think of the signs as four in a grouping.

Would you say that from any vantage point, is it 20 percent visibility, is it 100 percent visibility, is there a way for you -- because I think that you may have been understating it -- to give a sense of what type of visibility those signs would have with regard to the park?

A. Those signs would disappear in the background. I did mention earlier that there's an existing sign to the west extent of this property and one of the photographs submitted to the Zoning Board is a view from the park looking southwardly

and in that one photograph, that sign is seen in the background. I think it's to the right of the photograph.

Just as that existing sign is a dot in the background, I think these other four signs would be of the same general view.

MS. JAFFE: Where in the park is that taken from, at what point in the park? You indicated that it was like off the top part, is that correct, or is it [35] closer to the adjoining border?

MR. PRIMAVERA: We have other exhibits.

MS. JAFFE: I just want to clarify that on this photograph.

MR. PRIMAVERA: Al, let's do this, can you reference that so we get it into the record.

MS. JAFFE: You pointed to this one, the one that's been up, you pointed to the top of it, the sign.

THE WITNESS: The sign that's up is the yellow dot in this photograph. Sign A on Exhibit C is this first red dot. The photograph submitted was taken from generally this area. The photograph was taken looking southwardly to show the area and the background of Sign A.

MS. JAFFE: My question is, is it from the north most point of the park or is it from the south most point of the park?

THE WITNESS: I would estimate about -- the park being in the north/south dimension -- two-thirds of the way up.

[36]

MS. JAFFE: Thank you.

BY MR. PRIMAVERA:

Q. You said to me earlier, if I am correct, that the closer you are to the signs -- and you can use your finger to point to it -- the more difficult it would be to see the signs because of their elevation; and the further you go away, as you keep moving toward the entrance to the park, although they would logically be more visible, the distance from the signs itself would make them less visible. So you actually have a geometry here that works in favor of the signs not being visible?

A. Exactly. The further you get from the sign, the less legible the signs will be and the less they will appear on the horizon.

Q. And the closer you get to the signs physically?

A. The closer you get to the sign physically, you're right there at that V.

Q. What does that mean?

A. It's not visible.

Q. Is this the skateboard area that Mr. Jaffe was referring to?

MR. JAFFE : I don't know if this is [37] the skate area. It says on the caption "FDR Park"; however, I suggest the view of the picture does not show the play area -- that does not show the play area that extends into the area that I am pointing to immediately adjacent to the track of land that they are using.

I can say I have been there, I've walked there, I know it.

MR. PRIMAVERA: You are not a witness, you are an attorney. You can have that exhibit as Exhibit 16, just so the Zoning Board has an understanding of what we are talking about as the recreational area as we go under I-95. I think that may give them a better picture than perhaps what has been suggested.

I have no further questions of Mr. Tantala.

MR. JAFFE: I have another question because you brought up another exhibit.

RECROSS-EXAMINATION

BY MR. JAFFE:

Q. Is this a parking area right here?

A. Yes, sir, it is.

Q. Can you tell me -- we are pointing to an area close to proposed Sign A?

A. Sign A.

Q. Can you tell me what this is next to it?

A. No, sir.

Q. Is that part of the park parking area?

A. No, sir.

Q. Can I ask you, why didn't you take a picture of the sign that you are speaking about that's already in existence that is immediately next to Sign A?

The parking area and building on the photograph -- inside of the picture you took from a distance, don't you think it gives a much fairer point to the Board.

THE CHAIRMAN: Let me ask you a question, how many questions are you going to ask him?

MR. JAFFE: Many, Your Honor.

THE CHAIRMAN: Why did you take the picture from there?

THE WITNESS: The reason I took the photograph was to show -- I took the [39] photographs perpendicular to each one of the proposed signs. It just so happens that in taking a photograph of Sign A, this existing sign was in the background and I brought that up in order to point out the visibility of the existing sign.

MR. PRIMAVERA: Also, in Exhibit 15, which is the report from our next witness, you will see specifically the existing photographs which are depicted and it's going to be our argument that those photographs, as you will hear in the testimony, are going to be far, far more visible than the proposed four.

So we are using that to assist our argument, not to try to keep it away from the Board.

MR. JAFFE: Your Honor, I have to.

THE CHAIRMAN: Mr. Jaffe, as --

MR. JAFFE: Sir, I have to --

THE CHAIRMAN: Mr. Jaffe, as far as your reply to me, you will ask one question at a time.

MR. JAFFE: I will ask one question [40] at a time.

BY MR. JAFFE:

Q. Can you tell me how far A is from the sign marked with the yellow dot next to it? Maybe if you can help me, this is going in which direction, west?

A. Yes.

Q. How far is this west sign?

A. The distance from the existing sign to the west of the track to the proposed sign A is shown on Exhibit 6 as 589 feet.

MR. JAFFE: Thank you.

THE WITNESS: You are welcome, sir.

THE CHAIRMAN: Thank you.

* * *

JOSEPH BUCOVETSKY, having been previously sworn as a witness, was examined and testified as follows...

* * *

MR. PRIMAVERA: Mr. Bucovetsky, please state your name and address for the record.

THE WITNESS: Joseph Bucovetsky, B-u-c-o-v-e-t-s-k-y, Norman Day [41] and Associates at 1611 Walnut Street here in Philadelphia.

DIRECT EXAMINATION

BY MR. PRIMAVERA:

Q. Are your credentials attached to your report dated May 12, 1999, showing that you have advanced degrees in urban planning and architecture?

A. Yes.

Q. Your other experiences are also set forth in that resume?

A. Yes. I'm a certified planner of the American Planning Association.

Q. For how many years have you been involved in master planning and land use planning with regard to both urban rural and suburban areas?

A. About 15 years.

Q. You prepared a report, obviously, dated May 12, 1999, as well as other exhibits that we will use?

A. Yes, I did.

Q. You visited the site, risked your life by going up on the elevated portions of I-95 to personally take the photographs in the exhibit?

A. Yes, I did.

Q. You did so with an eye towards demonstrating to the Board existing land uses, including signs, in order to fairly and accurately depict what we are proposing today with regard to the Conrail property?

A. That's correct.

Q. Please state the nature of your investigation utilizing freely the exhibits that we have. All of these are reduced in size and attached to the report, and I will hand up another copy and give opposing counsel a copy to make it easier to track the testimony.

A. Our area of investigation is approximately a half-mile radius surrounding proposed locations of the signs. These exhibits which you see up here represent the primary area of investigation. We did, however, look further and, in fact, looked at the whole I-95 corridor from the Philadelphia International Airport to the port on the Delaware. We do have some larger exhibits, which we can also show you, which show the nature of that area.

In terms of the immediate area, as has already been indicated, there are four proposed [43] signs on the property of Conrail which is on the south side of I-95 west of Broad Street. We did look at the current land use. The property itself is used by the railroad.

The property adjacent to it is also used by -- it's owned by CFX Corporation and used for rail purposes. South of that is the property of the former Navy base which is used for industrial purposes, servicing of ships that are in the basin.

Q. Mr. Bucovetsky, just for illustrative purposes, we are holding up behind us a large aerial photograph. Can you tell us what's depicted here in yellow.

A. That is the Conrail site on which the signs are proposed.

Q. Could you match that up on both the current land use plan that you are showing, as well as the aerial photo that you are showing.

A. That area would be in here.

Q. Is that, like, a violet or a light blue?

A. It is.

Q. For the record, the yellow in the aerial photograph is the same as the violet or light blue [44] in the land use plan?

A. That is correct.

Q. Sir, can you tell us, starting with the former Navy yard property in which there appears to still be Navy ships and moving northward, what currently is in use physically as you move along that corridor.

A. It appears that there is still servicing of ship activities going on adjacent to the basin in the former Navy base. So we have the railroad lands which are actively used for railroads. We have an area of land between the railroad land and the right-of-way of I-95, which is vacant.

Q. When you say "vacant," can you please describe in detail because there might be some conflicting testimony.

What does it look like, what actually happens in this area between I-95 to the north and the Conrail property to the south?

A. The area we are talking about is in here. It really has a character which is divided at a point at about 1,500 feet west from Broad Street. To the east, most of this land is open and it's scrub vegetation, there is a fair amount of debris [45] and it's clearly vacant land.

To the west of that point, 1,500 feet west of Broad Street, the area is fairly heavily wooded. It does not appear to be actively used.

Q. Can you tell me what, if anything, goes on in the right-of-way under I-95.

A. The right-of-way under I-95 is generally vacant. It's used on kind of a casual basis by individuals who park cars underneath there. That is a fairly informal site. There is a portion of the area underneath I-95 which is the skateboard park that's already been discussed.

MR. AUSPITZ: Is there a fence there?

THE WITNESS: It's my understanding that there is a fence along the north side of the railroad.

MR. AUSPITZ: Is there graffiti underneath there?

THE WITNESS: Of course, the beams supporting the highway do have graffiti on them.

MR. AUSPITZ: So we can assume that [46] people have access under there for graffiti?

THE WITNESS: That's correct. Anyone can walk from the park underneath the elevated expressway and go into these vacant areas on the south side of I-95.

MR. AUSPITZ: So skate boarders could get to the poles if they wanted to?

THE WITNESS: Yes.

BY MR. PRIMAVERA:

Q. Using your photographs that you took yourself, in your report, can you describe to the Board what is depicted in this Photograph F, which is captioned "City owned property." Although, I am reluctant to point that out due to the condition of the property.

A. I would use this one, if I may, it is F, used at the site of this vicinity. This photograph is taken more or less in front of the proposed location of sign A, I guess it would be, perhaps it's D. It's the eastern most sign, the one that's closest to Broad Street, about 400 feet from Broad Street.

I'm standing underneath the [47] elevated portion of I-95, I'm looking across the area of land, which is apparently owned by the City of Philadelphia, which I've classified as vacant, towards the railroad. Beyond it you can see the ships in the basin of the Navy yard.

Q. The height of the ships, can you tell me the height of the ships, vis-a-vis the height of the signs that are proposed.

A. I am not certain of that. I do know that when you stand back in the park, one of the most prominent things that you can see over the raised highway are the masts of the ships. So from that basis, I would say that the masts are higher than the signs.

Q. Are the water towers and other improvements in the background emanating from the Naval shipyard?

A. They are. You can see these on Photograph B, these are general views eastbound on I-95 near the site and you can see the water tower of the Navy yard.

Q. You are also showing a photograph called vacant lands and tennis courts. This property, am I correct, is to the west of the tennis courts [48] which are otherwise depicted in the aerial photograph?

A. That's correct. We are shown that on this exhibit, the tennis courts are located here and there is an area of land to the west.

Q. Is it within the park grounds?

A. Which is within the park grounds.

Q. How would you describe it, as a land use planner, in nature of its improvement?

A. It appears to be used for a depository for various kinds of spoils.

Q. How would you describe, because apparently there is some debate over this, as you walk from Roosevelt Park -- let's say you are starting at the baseball fields, as you walk south towards the Navy ship, please tell me about the experience starting with the park, per se, which is improved grass and other improvements, and what you physically see, feel and experience as you go through the underpass of I-95, across the no man's land of Philadelphia owned property and onto the right-of-way and the Conrail owned property.

A. Starting in the park, the impression one has is a very attractive and bucolic kind of [49] place. You can see from these two views, which are taken near the boating pavilion.

Q. Where is the boating pavilion vis-a-vis this area?

A. The boating pavilion is here and the photographs were taken from this point here, they are near the boating pavilion. At that distance, you are approximately a third of a mile from I-95. The perception you have of the highway -- you really have to look for it.

I waited for the opportunity to see a truck going by so I could get that photograph and take that photograph. It is difficult to see the highway at that distance. You don't hear

the traffic on the highway, you don't until you get closer to the highway.

Q. There comes a point, according to the photograph, where there's a gray spot on the south side of the right-of-way of I-95?

A. That's correct.

Q. What's the material on the ground at that point?

A. That's a granular material, it's hard packed, not paved.

[50]

Q. Is it in shadows according to the photo?

A. That's correct.

Q. In land use planning, is that area an area that suggests or invites any type of active recreation?

A. It's very difficult to find a suitable use to go underneath the highway. It's not an area that's used at all.

Q. There is also, at some point, an area under the I-95 overpass which apparently looks like something for the older kids to do skateboarding?

A. That's correct.

Q. How would you describe the area once you leave the grassy portion and as you move under the overpass and move into the property which separates the railroad from the I-95 right-of-way?

In your experience, is that a welcoming experience or a hostile environment, using the photographs and your firsthand experience?

A. From a functional standpoint, the park ends at the right-of-way of the I-95 superstructure. Up above you come into an area that's clearly not in the park. It does not seem actively used for [51] anything. It's informally used for intermittent parking.

We talked about the graffiti painted on the superstructure of the highway and there is trash material dumped there. It's clearly a different experience, different from being in the park, which is pleasant.

Q. As a land use planner, what do you think about the advisability of having free access from the formal portion of park to the other side of I-95 and free access to railroad tracks via the dumping ground that you have identified?

A. I think it's inappropriate. I think what happened over the last few years demonstrates that functionally the park ends at I-95. It's inappropriate for that to be used for the park.

Q. Concluding your testimony as a land use planner and as someone who obviously spent a fair amount of time going to the site and doing the research and taking photographs, what, if any, impacts do you think the signs will have on

people who frequent the park and otherwise are trying to enjoy the bucolic environment which you've described?

[52]

A. No impact or no negative impact.

Q. In conclusion, if you look at the property in question, are you certain as to the borders of recreationally-zoned property, do they include the Conrail property?

A. Yes. We have another exhibit which shows the area that's zoned recreation extending underneath I-95 and includes the land owned by Conrail. It also includes the land on the east side of Broad Street, which is owned by the City and it's not used for recreational purposes.

Q. In your experience as a land use planner, is it advisable, for the safety of the property, for the rail yard to be zoned for recreational purposes, an area where people are along the tracks?

A. No, it is not.

Q. In your experience, what should this be zoned as, residential?

A. No. This would be either industrial or some kind of City transportation categories, clearly auto transportation zoning or industrial transportation would be appropriate.

Q As a land use planner, are you able to [53] identify in the exhibit an identical property, which I call it a twin property, which, in fact, is zoned G2 or LR which adjoins us?

A. There is such a property.

Q. It's also used for the railroad, I assume?

A. It's this property, adjacent to the south and to the east, and coming up into this area, into the food distribution area, which is zoned variously as LR and G2, both industrial classifications.

Q. I am pointing to G2 on the north side of Delaware immediately to the west of the park, where we also note there is a sign?

A. That's correct.

Q. I think Mr. Tantala suggested that the code allowed, as a matter of right, signs at that district at a previous time and then moving across I-95 to the south, you are showing the LR area, where there is also apparently a sign or signs that exist?

A. That's correct.

Q. Is there anything else in the report that you would like to highlight or would you like the report to speak for itself?

[54]

A. I think the report does speak for itself.

MR. PRIMAVERA: Thank you. I have no further questions.

CROSS-EXAMINATION

BY MR. JAFFE:

Q. Sir, if I may, have you walked on this area, this land yourself, have you walked in the area --

MR. JAFFE: Can we go back to your previous exhibit, Carl?

MR. PRIMAVERA: Sure.

BY MR. JAFFE:

Q. There is a gray area in between the proposed location which is marked vacant and which is part of the recreational use. Have you yourself walked on this area?

A. I have walked on that area.

Q. Would it surprise you to know that this is a favorite spot for rail watchers, people who are familiar with the names like GGI and SD and electromotive force, that people who are interested in watching trains and taking pictures of trains, that this is a very popular place in Philadelphia for it because of the high use of the two trackages [55] of Conrail?

A. I am not aware of that, but I am not surprised.

Q. Are you familiar with any fence that borders along the Conrail property?

A. It's my understanding that there is a fence and it's a fence which at some point breaks off and there is a lack of a fence and at other points there is one.

Q. You would agree that there is no fence from the edge of the railway going across the recreation open space under I-95 into the more grassed part of the park? There is no fence from here to here, pointing to the rail lines going towards the park itself?

A. I don't believe that there are fences in there.

Q. So it wouldn't surprise you that not only the rail watchers, but also the skateboard users and people who park their cars in order to get into sometimes a crowded park, would have access into what you are calling vacant land, there's no fence to stop them?

A. It's true. The land in question, however, [56] is heavily wooded that you are referring to and it would be unlikely that they would be able to use skateboards in that area.

Q. Do you usually consider heavily wooded area and grassed area as vacant land, as an urban planner?

A. It depends. It depends on the use. For example, as you can see from this photograph of the area, which has scrub vegetation.

MR. PRIMAVERA: Is that Photo F?

THE WITNESS: Yes.

MR. PRIMAVERA: That is City owned property, by the way.

THE WITNESS: That's correct. Based on what I was able to observe there, including the scrub vegetation and including the dumping materials and the trash and broken bottles and such, I would say that that would properly classify it as vacant.

BY MR. JAFFE:

Q. But not all of this area, you would agree, is with broken bottles -- is trashed, you would agree that this is just one selected area?

[57]

A. I would say there is a wide area that seems to have materials and debris and trash dumped upon it, underneath I-95 and in the area that I am calling vacant that's south of I-95.

Q. You were here when I asked Mr. Tantala about what are these two rectangular marks on the overhead pictures immediately next to a parking area, he said he didn't know what it was.

Isn't it correct that you said that those are actively used tennis courts?

A. Those are tennis courts, yes.

Q. Isn't your proposed A less than 500 feet from the tennis courts?

A. It appears that way, yes.

Q. Did you hear Mr. Tantala say that the signs would be visible from the elevated area around the pond, the fancy -- what I call the ornate stonework area around the pond and you called it a bucolic place?

A. Yes.

Q. Would you agree with Mr. Tantala that the signs would be visible from these locations?

A. I would say that it's possible they would be visible.

[58]

Q. So you haven't done a study to determine that the sign will or won't be visible from the most ornate and heavily used fishing area and boating area of FDR Park?

A. I haven't. What I would say --

Q. You haven't.

A. What I would say is that I was not able to see these existing signs also on the south side of I-95 from that position.

Q. You stated that you didn't think that the area under I-95 -- in what you, I believe, misclassified as vacant area -- that it's not suitable.

Could you point out on the map, to the best of your knowledge, what is FDR Skateboard Park.

A. I believe it is in this area.

Q. Could you say what proposed sign that area is near?

A. I have my letters correct, I think that's Sign C.

Q. If I understood you, you said there is painting on the structure of the highway, you called it graffiti?

[59]

A. Yes.

Q. There could be painting and access to the poles that will support the signs, as well?

A. It's possible.

MR. JAFFE: Thank you.

REDIRECT EXAMINATION

MR. PRIMAVERA:

Q. Just in closing here, you have seen this exhibit and you have prepared it?

A. Yes.

Q. Does this, in fact -- I think the language may be small -- indicate that Roosevelt Park to the west adjoins Philadelphia Solid waste Transfer Station?

A. Yes, it does.

Q. Further to the west is the marine industrial area and the petroleum tanks for the refineries?
A. Yes.

Q. As we cross the Schuylkill, we go into the sludge beds which are identified --

MR. JAFFE: I object, this is irrelevant.

THE CHAIRMAN: So noted.

[60]

MR. JAFFE: We can keep going up the --

THE CHAIRMAN: So noted.

MR. JAFFE: This is way off the map.

THE CHAIRMAN: Please, so noted. Ask the question, Mr. Primavera.

BY MR. PRIMAVERA:

Q. With regard to the Navy yard, which is immediately to the south, you said that those activities appear to be still related to Navy activity with regard to the ships and other military activities?

A. Yes.

Q. As a land use planner -- because I may anticipate some other testimony -- you are familiar with the conversion process from the military to the commercial industrial sector?

A. Generally familiar, yes.

Q. You are familiar with the Broad Street entrance?

A. Yes, I am.

Q. Do you believe, in your expert opinion, that these four signs located in accordance with [61] the site plan would in any way negatively impact the viability or visibility or the suitability of the Navy yard for either the original industrial activity or the hopeful conversion to the commercial and industrial activities?

A. I do not believe it will have an impact on them.

MR. PRIMAVERA: I have no further questions.

I have one final and very brief witness representative from Conrail, Mr. Robert Orlando.

* * *

ROBERT ORLANDO, having been previously sworn as a witness, was examined and testified as follows ....

* * *

MR. PRIMAVERA: Please state your name for the record.

THE WITNESS: Robert F. Orlando, 100 North 17th Street, Philadelphia, PA.

DIRECT EXAMINATION

BY MR. PRIMAVERA:

Q. Sir, by whom are you employed?

[62]

A. Transportation Displays, Inc.

Q. Are they not the agent for Conrail with regards to utilizing their right-of-ways?

A. Yes, we are.

Q. How long has that relationship been in place?

A. Since Conrail's inception in the 1970s.

Q. Are you familiar with the 1989 applications?

A. Yes.

Q. Do you recall the applications which were submitted for these signs, but were refused because of the recreational nature of the zoning classification?

A. Yes.

Q. Was the property at that time or is the property now used for recreational purposes?

A. No.

Q. Is the rail line which is there currently in use?

A. Yes.

Q. is it likely to stay in use?

A. It's likely to stay in use for a long time.

Q. Why is that?

[63]

A. Because of the improvement we have made in the transintermottal (ph) facility, it will be more easily used as a rail facility now.

Q. So there is no present intention of Conrail to give up their rails and give the property to the City or to the park land?

A. No.

Q. Will these signs in any way interfere with the use of the track for railroad purposes?

A. No. They will not infringe on the railcars.

Q. Are you familiar with the other signs in the area?

A. Yes.

Q. How long have they been there, generally?

A. Those signs have been there 10, 15 years.

Q. Is it your understanding that had this property been zoned either LR or G2 in 1989, permits would have been issued as a matter of right for these four signs?

A. Yes.

Q. Has Conrail ever abandoned its hope to have signs on this location?

A. No.

[64]

Q. Has City Council taken any action to rezone this property?

A. Not that I am aware of.

Q. There's a memo that you prepared for me showing, in the normal course of events, Conrail, due to changes in the track or other developments, will give up sign locations in the City of Philadelphia?

A. Yes.

Q. Does your memo say that over the past several years, that some number of signs have been removed?

A. Yes. Since the new ordinance went into effect in 1991, there were 30 fewer signs on Conrail property in the City of Philadelphia.

MR. PRIMAVERA: I have no further questions.

MR. JAFFE: I will very brief, if I may.

THE CHAIRMAN: Please.

CROSS-EXAMINATION

BY MR. JAFFE:

Q. Conrail is mainly a railroad at this point?

A. Yes, it is.

[65]

Q. It's correct that Conrail is not prohibited in any way from using the area proposed for anything but a rail? There's

nothing injuring Conrail's use of the proposed area of the signs for railroad use?

A. Not to my knowledge.

Q. You said that they are fully used as a rail line?

A. I don't know about fully, but it's an active rail line.

Q. It's a double line?

A. There are two separate lines there.

MR. PRIMAVERA: One is Conrail and one is for --

THE WITNESS: CSX.

BY MR. JAFFE:

Q. I would like to ask you, does TDI have any unlicensed billboards in the City of Philadelphia?

A. No, we do not.

MR. JAFFE: Thank you.

MS. LEONARD: I just have one question. In 1989, when Conrail was refused the permit, was there ever an appeal taken of that refusal challenging [66] the zoning of that track?

THE WITNESS: No. We did not take an appeal. There were some discussions with counsel at the time about

rezoning the parcel. In 1991, the ordinance did change, we never really gave up on the idea of putting signs here. We would like to have been here sooner than later, unfortunately, we waited a long time.

MS. JAFFE: You indicated that Conrail had 30 fewer signs as a result of legislation that was passed; am I correct?

THE WITNESS: No, not as a result of legislation. There are 30 fewer signs based upon development that has taken place, either at the sites or the traffic on the streets, where the signs are diminished and the signs are not suitable anymore or there are public projects, such as road improvement, bridges or railroad projects that have caused us to remove signage.

We have not put a sign up on Conrail property in the City of [67] Philadelphia since 1991.

MS. JAFFE: How many billboard signs are existing in the City on Conrail property; do you know that?

THE WITNESS: I don't have the total.

MR. PRIMAVERA: But it would be substantial --

THE WITNESS: There are many signs.

MR. PRIMAVERA: In similar areas following the right-of-way industrial property?

THE WITNESS: Yes.

MS. JAFFE: When they say "many"?

THE CHAIRMAN: Do you have a general idea?

THE WITNESS: There are several hundred. My company and Conrail throughout the country makes wide use of their right-of-way for outdoor advertising. It's a hand-in-hand use and it fits in nicely with the rail use and the two work very, very well together.

MS. JAFFE: How many of those [68] several hundred would you say were by variance and how many would you say were by right?

THE WITNESS: I couldn't begin to answer that. Again, we have not put up a sign in the City of Philadelphia since 1991.

REDIRECT EXAMINATION

BY MR. PRIMAVERA:

Q. As a representative of Conrail, would Conrail ever give consent for individuals that may be attracted to wander past the City property and onto the track for either watching trains or hobo activities or other activities described today?

A. No.

MR. PRIMAVERA: Thank you.

MR. JAFFE: I have to ask a question in response to that.

RECROSS-EXAMINATION

BY MR. JAFFE:

Q. As you are from TDI and Conrail, you must be familiar with what protection or fencing there is along Conrail's property.

Could you please point out on the [69] map or would you verbally describe it for the record, if there is a fence and where it's located.

A. There is a fence there that's in portions, there is a portion of the fence that's also in disrepair and it's intermittent along the northbound edge of our property.

MR. PRIMAVERA: Is it your property or is it City property or can't you tell?

THE WITNESS: It's hard to tell from the site.

BY MR. JAFFE:

Q. You would agree that there is no barrier and that the park usage goes clear through to the fenced area of the adjoining right-of-way of the rail line?

A. I would agree that there is no fence between the park and our rail line.

MR. PRIMAVERA: You have to answer the question, though.

MR. JAFFE: I think he did. There is no fence, in that there is access.

BY MR. JAFFE:

Q. Is that correct?

[70]

A. There is access, but I believe that the highway itself is a barrier.

Q. Isn't there clear --

MR. JAFFE: I think we have shown on the record, just for time sake, that there is clear access under the highway and the skateboard park is there, there is parking there, that the highway is raised and that there is nothing that interferes with people as they are going clear through.

MR. PRIMAVERA: I think the question was, if that's a concern to Conrail due to the claims that it will experience due to free access by unsupervised children who may wander through there and the fence should be there and we agree to that.

MR. JAFFE: Thank you.

THE CHAIRMAN: How many witnesses do you have? How much time do you need?

MR. JAFFE: I didn't bring these people. I have four witnesses with me and we have PIDC.

THE CHAIRMAN: Do you have a statement?

MR. GRADY: Yes. My name is John Grady and I'm a vice president of the Philadelphia Industrial Development Corporation. We have previously submitted a letter to the chairman registering our view that this --

THE CHAIRMAN: You're in strong opposition?

MR. GRADY: In strong opposition to this due to the impact that it would have on thedevelopment of the adjacent Philadelphia Improvement Center.

MR. JAFFE: Can I get a letter of that?

MR. GRADY: You can take one, they're here.

MR. JAFFE: Thank you.

THE CHAIRMAN: Any questions for this witness, Mr. Primavera?

MR. PRIMAVERA: No. Just for the record, I did speak by voice mail a couple of times and I spent a good hour with Ms. [72] Vansustern and gave her copies of the plans.

The original concern that she expressed was where the property was posted on Broad Street. The posters were just there to be visible, as you will see and as the plan indicates, the signs will not be adjacent to Broad Street.

So we have had conversations and I offered to be as helpful as I can to provide any information.

MR. GRADY: If I may just respond. Our general concern is -- and you can note on the aerial photo that was provided by counsel. In general, the proliferation of billboards along this access of Route 95 blocks visual access of the Navy base. I think one of the previous witnesses noted actually that the predominant visual image is that of the Navy ships that remain on site and will remain on site for the foreseeable future.

We think that the continued proliferation of billboards here blocks [73] what is an attractive view of the site and which on behalf of the City and the Philadelphia Authority for Industrial Development will limit our ability to market this site to outside business.

In addition, at the ground level, if we continue to add billboards along this ground level, in the future we will be making road improvements through this area which will continue to create a blemish on the site.

MR. JAFFE: I would like to ask you briefly, is there anything that you've heard today from those proposing the development of the four signs that would change PIDC's opposition?

MR. GRADY: No.

MR. JAFFE: No, there isn't?

MR. GRADY: No.

MR. JAFFE: Thank you. If I may, Chairman?

THE CHAIRMAN: How much time do you need here?

MR. JAFFE: I will try to be brief, [74] I can do it in 20 minutes.

THE CHAIRMAN: Let's do it in ten, sir.

MR. JAFFE: You are familiar with the Rivera case, 70 13 A 2nd?

MR. PRIMAVERA: Yes. We can submit legal materials and do a brief.

MR. JAFFE: This is a case that is exactly on point because it's where the Commonwealth Court found that the railroad usage, which is very, very similar, if not identical to this, was not a hardship.

MR. PRIMAVERA: Now, I am going to object. We are getting into argument. Our case is also that this is zoned for recreational.

So you are really not addressing the argument, but I don't think it's appropriate to argue now. It's time for testimony and we can submit briefs.

THE CHAIRMAN: Do that, that will be fine.

MR. JAFFE: I would like to give that to the Board.

Addressing the injury of public welfare and public interest, we have witnesses, if they were able to stay, and if you could come forward and briefly state your name, organization and why you are here.

MR. DICTOR: I'm Larry Dictor, I belong to two civic associations, South Street Neighbors and Queens Village and I sit on the board of both. I'm a founding member of South Street Mini-Station and I'm a member of the Fairmount Park Advisory Board.

MR. JAFFE: Do you have a position pertaining to the proposed installation of four signs on the Conrail lot?

MR. DICTOR: I'm a little different, you asked for facts, Mr. Chairman, there are actually three sets of facts. The most important fact is that zoning is what makes the quality of our City, whether it's going to be good, bad or indifferent. You have the opportunity to use it and use it wisely, how the City is [76] going to look like, how comfortable it's going to be to live in, that's the first fact.

The second fact, there is a billboard industry and they are legitimately entitled to make as much money legally as they can. Their job is to put as many billboards on the street as they can. At the same time, there are also some regulations and from state to state it's different and then Philadelphia has its regulations.

There is a large body of people and they range from they don't want to see one billboard to at least put them in their proper place.

What we are asking the Zoning Board is in their wisdom to decide -- you heard all the facts-- what is best for the City of Philadelphia. There are plenty of places for billboards. There is only a finite number of spaces in Philadelphia, the air, the parks. Each time you put one billboard up, that's going to be there, [77] there is that much less. One billboard isn't that -- but it's still one less of open air, one more piece of light it goes on and on.

We're asking you to think carefully before you decide, whether the fact that the billboard people will not make that much money, maybe they figure it's a contribution to Fairmount Park, the fact that -- we will give them a letter to that effect if they want.

Think carefully please what is best for the City of Philadelphia and not just for one particular group. Thank you.

MR. PRIMAVERA: Just for the record, I know Mr. Dictor, I know he's a taxpayer because he lives on South Street. So I will object only on the record for the fact that these people have no traditional agreement; but we also know that this is a taxpayer.

I will acknowledge his taxpayer standing, but I don't think that there s any way he could navigate to get down here without a car; but I am objecting with regard to all the testimony under the typical agreement standard since nobody

lives anywhere near here, unless they are one of the hobos that Mr. Jaffe personally met.

MR. JAFFE: There are skate boarders, rail people and dog walkers.

THE CHAIRMAN: Move on, Mr. Jaffe.

MR. JAFFE: I was hoping not to have to go into this, but since Mr. Primavera raised it, here is the reason Commonwealth Court --

THE CHAIRMAN: We had it last week.

MR. JAFFE: Which I am very pleased about which does grant standings to all taxpayers. I would also state that all these people have standing, as well, because of their particular interest in the field of parks and concerning abuse of the parks and billboards, as well.

We have another witness.

MS. ANDREWS: I'm Stephanie Andrews, I am the director of Friends of [79] Philadelphia Parks and we are very concerned about any encroachment on Philadelphia's incredible legacy of open space. It is what makes life in this City for all of us as wonderful as it is.

One question I have for the expert is that these signs are going to be 66 feet in height, the top of the sign, 66 feet above the surface of the road; am I correct?

MR. PRIMAVERA: 25 feet above the road.

MS. ANDREWS: Let me just ask one single question, from the rim of the boat basin, has anyone put a dummy structure up to see whether or not that is visible from that site? Supposing it isn't visible is very different from once it's in and then, "Oh, gosh, it is," and that's a concern of ours.

MR. PRIMAVERA: I think the testimony was by both the engineer -- and the land use expert spent a considerable amount of time -- and it was their [80] testimony that it will be visible at various spots, although the visibility fades because of the background of I-95, the traffic and the ships. So there is no guessing about it.

MS. ANDREWS: Fine.

MR. JAFFE: You would agree, Carl, that I did ask your land use expert whether he, in fact, did do any tests for lines of sight and he said that he did not?

MR. PRIMAVERA: I think he said he did the studies that he thought were relevant and helpful. He might not have done the studies that you wanted him to do.

* * *

STEPHANIE ANDREWS, having been duly sworn as a witness, was examined and testified as follows...

* * *

DIRECT EXAMINATION

BY MR. JAFFE:

Q. Could you tell us, how long has your organization been in business?

[81]

A. Friends of Philadelphia Parks came into existence in 1983.

Q. Can you tell us what the purpose of your organization is?

A. Our mission is to educate the public and provide support and awareness of the needs and the values of Philadelphia park land.

Q. Does your organization have a position on the installation of the four double signs on this one large lot of Conrail?

A. Yes, we do. We do not want anything to encroach upon the visibility and the feeling of open space in FDR park. We want it to remain as open as possible.

Q. Do you think this will help or hurt the park?

A. I think it would hurt it.

Q. Do you think it's in the public interest or against the public interest?

A. I think it's against the public interest.

MR. JAFFE: Thank you very much.

MR. PRIMAVERA: I have no questions.

THE CHAIRMAN: Who else do you [82] have?

MS. INGRAM: I have a brief statement that is really more by way of legal argument --

THE CHAIRMAN: Who are you?

MS. INGRAM: I'm Judith Ingram from the Center City Residents Association, CCRA, I'm a taxpayer. I object to these four billboards.

As part of the gateway to Center City, we have anticipated Mr. Primavera's objection, we have jurisdiction not just as taxpayers, but under a more traditional grievance standard, due to our long-standing subject matter interest in this legislation and its enforcement; and because if the tear-down provision were to be enforced, the biliboards to be torn down would be in our neighborhood, as well as others.

In addition, the interest that the general outdoor advertising section of the zoning code is intended to protect that of the public's view of a right to privacy.

[83]

Reference to this particular case, I would just like to make two fast legal observations here. One is the fact --

MR. PRIMAVERA: If this is argument --

MS. INGRAM: I said that I would be --

MR. JAFFE: No one has said -- first of all, she's an attorney; two, she is representing her institution.

THE CHAIRMAN: Go ahead.

MS. INGRAM: One is that the traditional hardship is required to demonstrate under the zoning code a variance that has not been demonstrated here for even one sign, much less four signs on the lot. Since the property is in use and was no doubt purchased by Conrail for use as a railroad.

Secondly, and I have to admit, I am just dazzlingly confused by this concept that somehow the zoning itself, the very fact of the zoning itself, is the hardship.

[84]

My house used to be zoned C4. In 1973, I could have built a high-rise apartment building on it, but I am not here claiming that I have the right to do this and this is doubly so since the billboard section of zoning law, in effect, did not recognize the concept of grandfathering; but here we are being asked to grandfather things that don't even exist.

Secondly, and I could spend some time on this, but I am sure that you can appreciate the time, let's grant, somehow, their wish and rezone this property to L4, they would still be before you to ask for these billboards because

we feel these billboards are too big, too high, too whatever, no matter what the zoning category would be here.

With that, I will close.

THE CHAIRMAN: Thank you.

MR. JAFFE: I don't know who this gentleman is.

THE CHAIRMAN: Speak forth.

MR. STRUEBLE: For the record, my [85] name is John Strueble. My address is 609 Bainbridge Street, Philadelphia 19107.

I recently moved to Philadelphia from Chester County and I like the City and I think the Zoning Board should take a look at the broader picture, there are already 40 billboards between the bridge and Exit 16 in that little area along I-95 in between South Philadelphia.

Although they come up with each individual billboard as an application, they don't have any right here to get a variance and I would like the Zoning Board to consider the bigger picture of what is happening down there along that stretch of I-95.

MR. JAFFE: Sir, are you a taxpayer of the City of Philadelphia?

MR. STRUEBLE: Yes, I am.

MR. JAFFE: You live in the City of Philadelphia?

MR. STRUEBLE: Yes, I do.

MR. PRIMAVERA: Where?

MR. STRUEBLE: 609 Bainbridge, but [86] I drive on I-95 a lot.

THE CHAIRMAN: Thank you.

MS. TRACY: Good evening, my name is Mary Tracy. I'm the president of SCRUB, Signs Created to Remove Urban Light. SCRUB is a grass roots coalition of neighborhood groups, religious, health and business organizations, we were formed in 1990 to provide a voice to the Philadelphia communities concerned about the proliferation of billboards.

SCRUB's efforts contribute to the unanimous passage of two comprehensive sign control ordinances and we were able to cap the allowable square footage of signage in the City. We also set specific distances of 660 feet from parks, playgrounds; and 300 feet from people's homes; and 660 feet from egress and ingress; and all of these provisions are being violated by this -- would be violated if this variance request be granted.

I would just like to respond to Mr. Primavera's, I guess, hope or wish to turn [87] back the clock to 1989; but we can't turn back the clock, nor would any of us want to. This is 1999, we have a law that's been on the books since 1991.

This request is not a minor departure, it's not a minimum departure, it's a major request of putting billboards in the very areas that the neighborhood groups across the City sought to protect.

So I would ask this Board to please take their responsibility seriously to protect the public welfare and deny them a variance. Thank you.

MR. JAFFE: Sir, if I can take 90 seconds, there is an election next week and who knows who will be here.

THE CHAIRMAN: You've just lost five, now you are down to 85.

MR. JAFFE: There is no right to a variance for the highest and best use or the highest financial gain, the Commonwealth Court has spoken many times clearly on that.

City Council in their best and [88] considered decision has decided what they call vacant land is recreational. The applicants want to go back and say it's not recreational. That's already been considered andrejected by City Council.

Section 14 1604 of the City ordinance says this is wrong for a lot of reasons, 500 feet of signs, it's more than a thousand per sign on the support, it's too high, it's within 660 feet of Fairmount Park, it's within 660 feet of a recreation facility. This is an egregious effort to put eight billboards directly adjoining one of the most beautiful places in South Philadelphia. If you haven't been there, I urge you, please go there and you will see for yourself. Thank you.

THE CHAIRMAN: Go ahead.

MR. PRIMAVERA: Mr. Kelly, I have cases, which I will hand up, basically the argument is that this zoning classification is totally illegal and the law says that if you have a zoning classification -- and I don't hear any argument on this, it's [89] totally illegal -- then either they have to pay just compensation because of the taking or because it's illegal the zoning Board and the courts have to give what's called site specific remedies, which basically means that what we come in with in our application has to be approved.

This is not your typical variance and I'm not surprised that a lot of people don't know about it; but it's basically, in addition to the arguments we are making under the variance criteria, we are saying legally where City Council has mistakenly zoned nonpublic property for recreation, that is a nullity and as a matter of law this property, therefore, as a matter of law, is unzoned. There is no zoning.

It's as if City Council had said, "This is not to be zoned."

And the courts say, in effect, "This application has to be approved."

This law, I think, will be very helpful. I think that may be --

MR. JAFFE: Will you send them to me?

MR. PRIMAVERA: I will send them to you also.

MS. TRACY: Excuse me, I forgot to say that I'm a taxpayer in the City of Philadelphia and that's an important point I needed to make.

Also, I just really wanted to reiterate the whole idea of the railroad --

MR. JAFFE: You've covered that.

THE CHAIRMAN: Planning Commission?

PLANNING COMMISSION: The Planning Commission's comments will be submitted in the form of a letter at a later date.

THE CHAIRMAN: Thank you.

* * *

(Hearing concluded at 6 20 p.m.)

* * *

CERTIFICATION

I, N. Richard Roberts, hereby certify that the foregoing is a true and correct transcript of the proceedings held in this matter as transcribed from the stenographic notes taken by me on Wednesday, May 12, 1999.

/s/_____

N. Richard Roberts,
Professional Court Reporter
Notary Public

(This certification does not apply to any reproduction of this transcript, unless under the direct supervision of the certifying reporter.)

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APPENDIX I

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

JULY TERM, 1999
NO. 3700 : NO. 3705 : NO. 3707 : NO. 3712

SOCIETY CREATED TO REDUCE URBAN BLIGHT (SCRUB), et al.	)
v.	)
ZONING BOARD OF ADJUSTMENT OF THE CITY OF PHILADELPHIA, et al.	)

January 24, 2000

Courtroom N
Complex Litigation Center
John Wanamaker Building
Philadelphia, Pennsylvania

BEFORE: HONORABLE STEPHEN E. LEVIN, J.

APPEARANCES:
SAMUEL C. STRETTON, ESQUIRE
Counsel for Appellants

CARL S. PRIMAVERA, ESQUIRE
Counsel for Appellee, Conrail

CHERYL GASTON, ESQUIRE
Deputy City Solicitor
Counsel for City of Philadelphia

ROBERT JAFFE, ESQUIRE
Office of Councilman David Cohen

[2]

MR. STRETTON: Good morning, your Honor, Sam Stretton.

MR. PRIMAVERA: Good morning, your Honor. Carl Primavera.

For the convenience of all parties, I brought some of the exhibits from the actual hearing. They are attached to the brief but they didn't come out very well so if, at some point, either Sam or I or the City need to refer to them, they are here.

THE COURT: Hold the record.
(Discussion held off the record).

MR. STRETTON: Sam Stretton on behalf of the appellants, SCRUB, Friends of FDR Park, Councilwoman Verna, Councilman Cohen and Center City Residents and Mary Tracy.

MR. PRIMAVERA: Carl Primavera on behalf of appellee, Conrail, care of TDI.

MS. GASTON: Cheryl Gaston for the City and the Zoning Board.

MR. JAFFE: Robert Jaffe, office of Councilman David Cohen.

THE COURT: Mr. Stretton, this is your appeal on behalf of SCRUB and the other individuals.

Would you proceed, please.

[3]

MR. STRETTON: Thank you, your Honor.

It is a pleasure to be back here again. I wish I was here more and less all over the state.

Your Honor, this is another SCRUB appeal. There's really four cases. The numbers are July Term, 1999, 3700, 3705, 3707 and 3712.

I submitted four separate identical briefs because the signs were all included in one hearing. In fact, it was my intention to ask if you would consider consolidating all four of these for the purpose of today's hearing, and if anyone decides to take than appeal later, it would be less costly and it would seem to be that judicial economy, since the exact same issues would dictate, that that might be a prudent thing to do.

THE COURT: Let me ask Mr. Primavera if that's acceptable to him for purposes of appeal from here.

MR. PRIMAVERA: Yes. That's fine. We have no objection to that.

THE COURT: Miss Gaston, does that pose any problem to you?

MS. GASTON: No, it shouldn't.

THE COURT: We understand that there's [4] four separate signs on one property owned by Conrail and that the issue is identical in all of them, as far as I understood, although there was one point in reading this I was a little confused.

It appeared to me that one of the signs might not be prohibited by being within 660 feet but I wasn't sure about that, so I'll wait, but if they are all identical, that's not an issue.

MR. STRETTON: I think they all are. The testimony of Albert Tantala indicated signs B, C and D are clearly within 660 feet of ramps A and C of the 1-95.

He noted that sign A was not within the 660 feet but we submitted a report later from Gray Smith subsequently and the Zoning Board noted that he was not subject to cross examination, and he indicated all signs, including sign A, are within 660 feet of the Broad Street ingress and B, C and D were 660 feet within the 1-95 egress. Sign A was also within 589 feet of existing sign, according to Mr. Tantala on this

particular matter, and all are, of course, by the recreational area of the FDR Park.

THE COURT: Mr. Primavera can tell me if that's an issue at a later time. It is clear that [5] the principle applies to all of them.

MR. STRETTON: Your Honor, this is again the classic situation of signs being placed on the Conrail right of way.

You will note that there are no signs being withdrawn although Conrail did testify they have had 30 less signs over the years, if I recall the testimony, but no signs have been specifically withdrawn.

These signs, at least as initially proposed, were all too big for the height registration although Mr. Primavera indicated that all the signs would be reduced to 14 feet by 48 feet, if I recall, somewhere in the notes of testimony.

There's no dispute both Mr. Tantala, Mr. Primavera's witness or Conrail's witness, and Mr. Orlando, the fellow that works for Transportation Displays, the organization that helps to fill up the right of way of Conrail in a profitable fashion, indicated that the rail lines are still in active use and there's no dispute about that they are, that the area is used for the stated purpose by trains running back and forth. These are not rails that are inactive in any way. That's undisputed.

[6]

It is our position initially that this is a very straightforward case. We have city ordinances that say no

signs. It is zoned recreational, and we will get to that issue in a second, but whether it is zoned recreational or whether or not it should have been a lesser zoning ordinance that might have allowed signs than some lesser capacity, it is overridden by the city ordinances that say no signs, are not a permitted use in these particular areas.

It is our position that this is not dimensional zoning under the recent cases. It is our position that they are not allowed. It is not a situation like a homeless shelter or rebuilding a new building, as some of the more recent cases since the Supreme Court decision in this particular matter, where it is allowed but the footage has to be increased.

This is a situation where the ordinance is clear, no signs, and the ordinance defines public policy and says it is against public policy.

This is a situation that's clearly similar to the earlier case that we had involving SCRUB v. Revere up in the Northeast on Woodhaven Road where there was an attempt to put a sign on the railroad [7] tracks, and using the traditional analysis of hardship, the Commonwealth Court held and I have cited that in my brief and I think you are familiar with it because it had reversed your Honor's original ruling on this particular matter, the Commonwealth Court held that the property was being used for its full and best use. There was no hardship and further held though, the second prong, that it was clearly against, public policy as stated in the ordinances, and that is the -- that in the terms of the traditional argument, I suggest this case is very similar and you don't have to go back to the dimensional argument looking at the other various factors but even if you did, I

would suggest that we still would prevail in this particular situation.

There is no hardship and it is clearly against public policy. It is not a dimensional use case. Whether it's recreational, it does not allow signs or whether, if you would agree with their argument, that it should be considered something else because of whatever mistake was made, the ordinance still would prohibit signs. It overrides any other lesser zoning classification.

Now, that issue is before you in a couple other cases that you have. I think there's four [8] or five cases where we argued these back in March where you owe us decisions on that very particular issue.

THE COURT: As you know, I was holding those cases waiting the allocatur which I just received from the Supreme Court to see whether or not they would change the Commonwealth's decision on standing, and I didn't want to decide those because some of those cases have standing issues in them.

MR. STRETTON: I'm not criticizing you.

THE COURT: I understand.

MR. STRETTON: But it is the same issue.

THE COURT: I wanted the record clear of the reason but the same issue here is an issue that I am glad we are going to refresh my mind in.

You have an ordinance which says a non-accessory sign is prohibited if it is within –

MR. STRETTON: 660feet -

THE COURT: -- 660 feet.

MR. STRETTON: – of the ingress or egress in the right of way areas, which this is.

THE COURT: Of the highway system.

MR. STRETTON: Yes.

THE COURT: Basically, I-95 and the Vine Street Expressway, as I remember.

[9]

MR. STRETTON: That's correct, sir. That signs have to be taken down if others are put up, that the footage has to be a certain -- under a certain size, which they are not.

THE COURT: Could they comply with this by giving up five other signs?

MR. STRETTON: No.

THE COURT: There's four here. Can they comply with it by giving up four other signs somewhere else?

MR. STRETTON: No, your Honor, because although that is something else, a consideration, they still would be

prohibited due to within the area of one ingress/egress and because it is zoned recreational.

THE COURT: Let me understand this in the ordinance. I mean that's not what's happening here but the ordinance says you can't put up another sign within 660 feet.

I thought it said unless you take down another sign.

MR. STRETTON: Separate provision. That's another consideration but it still is a prohibited use.

THE COURT: In other words, it is [10] prohibited even if I take down another sign.

MR. STRETTON: If you are within the 660 feet, you can't put up a sign. if you are someplace else and --

THE COURT: Suppose I have another sign within 660 feet that preceded the ordinance. Did not the ordinance permit me to take that sign down and put this one up?

MR. STRETTON: Not to my understanding of the ordinance but I have to -- indulge me one second. My expert --

MR. PRIMAVERA: I would agree with that.

THE COURT: It doesn't.

MR. PRIMAVERA: It doesn't.

THE COURT: It doesn't, so they just prohibit.

MR. STRETTON: Separate provision in terms of footage. In other words, if the only issue was square footage, then if they took down another sign, that might be allowed but not for if it's within these areas because there's such a strong public policy statement in the ordinance.

THE COURT: I understand. The public policy statement is we are not going to put any more [11] signs-up and, therefore, that's it, that's your view.

MR. STRETTON: No, no. No signs up within this area. You are allowed to put signs up in areas that are not covered, assuming you meet the other requirements, but no signs within 660 feet. No signs when you are in that recreational area as defined by the statute.

THE COURT: I do understand that. I understand the motivation.

The motivation is you cannot --who is going to put up a sign more than 660 feet away from the Expressway? Why would they put it up?

MR. STRETTON: There's plenty of signs throughout this city that are not within –

THE COURT: Non-accessory Signs. No. They are accessory signs generally. Who is going to put up a sign? This is an attempt, a well motivated attempt by a group of people who don't believe we should be looking at these signs on our highways. That's what it's about.

MR. STRETTON: It is a well motivated attempt by our government, and the Mayor who signed this, this legislation, Mayor Go ode and City Council passed it and that is the law of the land.

[12]

THE COURT: Law of the land. Law of the land as long as it's there. Okay. I had the mistaken idea that you could take another one down. You couldn't. You are just prohibited from doing it.

MR. STRETTON: That's correct. If you look at some of the Hertzberg and some of the subsequent cases –

THE COURT: No. I don't think Hertzberg is applicable.

MR. STRETTON: Let me go to the other two arguments. First, it is my position their other two arguments aren't before you because they did not take a cross appeal.

The first argument, in essence, is that we were denied it wrongly because it shouldn't be zoned recreational. We applied for it back in 1988 or '89. L&I denied us a permit. We chose not to take an appeal then, believing that City Council was going to change the –

THE COURT: All right. I'm not impressed with that argument either. The thing that impresses me about this case however, however the Zoning Board dealt with it, is the fact that this property is presently and properly zoned.

MR. STRETTON: But they didn't take an appeal from that issue.

THE COURT: Before I get to that issue, you help me, it is clear that this cannot be a recreational property. It is not properly zoned recreational. It is not a recreational property.

MR. STRETTON: Based on Mr. Tantala and –

THE COURT: Based on the fact that the law is very clear that a recreational property has to be public. This is not public.

MR. STRETTON: It would appear that's correct.

THE COURT: Let's assume for a second, as I do, that that is an incorrect designation and that the act is improper in that regard or the designation is improper.

Where does it leave it in terms of its zoning?

MR. STRETTON: It leaves it as a recreational zoning because they should have taken an appeal of that either back in '88 or back when they got the Zoning Board's decision.

The Zoning Board granted them a [14] variance but the Zoning Board did not say this is not zoned recreational.

In fact, the Zoning Board's Opinion in Finding of Fact number one said the subject matter is zoned recreational and --

THE COURT: That's true, it is zoned recreational. The question is is it properly zoned recreational.

MR. STRETTON: The Zoning Board said we don't have the authority to change that.

THE COURT: They don't but I do.

MR. STRETTON: But he didn't take the appeal from it.

THE COURT: But I do.

MR. STRETTON: But he has to take the appeal.

THE COURT: I'm not sure of that.

MR. STRETTON: At least my experience.

THE COURT: It is a troubling question to me. It arose once before on a horticultural designation. I had the same issue. It was a question of whether or not I could basically say that this was in fact horticultural, which the Planning Authority said it was, and the designation was not and, again, [15] the same argument was made, that the zoning granted relief but granted relief on the wrong grounds and, therefore, did I have that issue in front of me.

Now, here we have very clearly there's no dispute. In the recreational one, there was a dispute as to whether or not it fit. This one, there's no dispute. This cannot be zoned recreational.

MR. STRETTON: If, in fact, it's not Conrail property per Tantala and --

THE COURT: It's Conrail property.

MR. STRETTON: But no one from Conrail said that. We have Tantala, who is not a surveyor and we had Orlando.

THE COURT: Sir, you started out by telling me this is a rail line.

MR. STRETTON: It is.

THE COURT: Rail lines don't run through recreational property.

MR. STRETTON: Except they can have easements and other things. Mr. Tantala and Mr. Orlando said there is none. I'm not trying to belabor this.

THE COURT: Factually, it is silly to dispute the fact this this is a railroad and it is not [16] public ground and it doesn't belong in the recreational category. I don't know where that takes me.

MR. STRETTON: You may be right but is it proved by Orlando and Tantala's testimony.

THE COURT: If it becomes the crucial issue, I can remand for a finding of fact on that, sir. We both understand that that's the reality. If you are going to dispute the fact, I don't know where the fact takes me, but I do know that factually if that's in dispute, I can supplement the record and

get some testimony on it. We all understand that this is a rail line and it's not a park.

MR. STRETTON: Assuming it is. I'm not trying to suggest it isn't. I'm just being the advocate, as I am supposed to be.

THE COURT: It is difficult enough when we know the facts, how to apply the law. This situation, is another matter. Assuming, as I do, that this is a railroad track and you have told me it is a railroad track.

Is there an active railroad track?

MR. STRETTON: Yes. It is active per Mr. Tantala, notes of testimony 28 --

THE COURT: Trains run on it.

[17]

MR. STRETTON: Yes, and Mr. Orlando's testimony.

THE COURT: I'm assuming that.

I like the one up in the Revere sign, which was a siding in a triangular little piece of property. Trains didn't really run through. This one is a track.

MR. STRETTON: I disagree. In Revere, the testimony was it was an active track. It was by the siding in the right of way but it was an active use of the railroad. That was my recollection of the testimony.

THE COURT: Okay. Let's stay with this one. This is an active track.

MR. STRETTON: Yes.

THE COURT: Assuming it's an active track and assuming, as I do, that the zoning classification is improper, where does that leave us?

MR. STRETTON: It leaves us two things. Number one, procedurally, it is not before you because it wasn't appealed but number two, it doesn't make a difference.

THE COURT: Why?

MR. STRETTON: Because assuming it was [18] the lesser classification which allowed signs in that, what was it, LR or zoning area, assuming under certain limited conditions it is overridden by the ordinance 1990 or 1991 that says no signs.

THE COURT: So '91's ordinance, in your view, prohibits signs within 660 feet.

MR. STRETTON: Yes.

THE COURT: Regardless of the classification.

MR. STRETTON: That's correct.

THE COURT: It doesn't matter whatever its zoning classification is. Even if that zoning classification would allow signs, this prohibits signs in that area.

MR. STRETTON: Prohibits it with a strong statement of public policy and, therefore, it's not a permitted use, which is where the Hertzberg cases sort of go off.

THE COURT: I understand. It is not a permitted use, in your view, even if you have no zoning.

MR. STRETTON: Right. Therefore, you don't get to the dimensional zoning argument.

THE COURT: Then you say that since all [19] of these signs cannot meet the '91 statute, they are prohibited and, therefore, they can only be granted a variance on the grounds of hardship.

MR. STRETTON: Hardship.

THE COURT: You are saying they can't meet the hardship test because they are actively using the property for the purpose that they need it, which is the railroad use.

MR. STRETTON: And the two step process, hardship and public policy. It's against public policy or public welfare. It's against public welfare. The Commonwealth Court. I have cited the language in my brief which said in the Revere case not only was it differently being used, i.e., used to its fullest use but second, they haven't met the second prong of the hardship test, public welfare, and it was against public welfare and against public policy as stated by these ordinances, and the Commonwealth Court said they could not get over that.

THE COURT: Judge Doyle said that.

MR. STRETTON: Three Judges said that.

THE COURT: Judge Doyle said that.

MR. STRETTON: But joined by his two colleagues. So it wasn't a one Judge decision. It was [20] a three Judge decision in that particular case.

THE COURT: We will both recall there was no highway built.

MR. STRETTON: Yes, but that wasn't the deciding factor.

THE COURT: I understand but Judge Doyle just avoided that. There was no highway there. It was within 660 feet of a right of way. There wasn't even a highway to be seen.

MR. STRETTON: But it made no difference by the statute.

THE COURT: By his view it made no difference. He doesn't like signs, as he told me.

MR. STRETTON: It is not a matter of liking. It's a matter that the ordinance says X and it should be enforced and that's why we're here in these matters, but it is our position, your Honor, that it is a classic case like the Revere and shouid be denied.

It doesn't go into dimensional zoning. It is not a permitted use but, as I always say, I always enjoy being with

Mr. Primavera because he is such a wonderful lawyer with creative arguments.

MR. PRIMAVERA: You will love it today. I promise you won't be disappointed.

[21]

THE COURT: Let us get to him then. Yours I understood. Let me get to him and I will give you a chance to respond because I'm looking forward to this myself.

MR. PRIMAVERA: I am, too, because this may be one of the most interesting zoning cases I ever had and to look at it so I guess serenely as Sam does is somewhat disappointing.

Just a few issues to start out with. One, this exhibit shows property ownership and the transcript is very, very comprehensive in terms of the ownership because it's a pivotal question and we have Conrail's representative. The deed is in evidence, the engineer licensed by the Commonwealth of Pennsylvania, land use planner, and everything is undisputed.

As a matter of fact, even Mr. Jaffe pursued some line of questioning saying are you sure it's fee and not easement, so that is really not a fact at issue.

The white area is known as FDR Park. The Senator from South Philadelphia would like two stadiums and a million square foot mall to go here but that's premature.

What happens here is FDR Park goes [22] right up to this I guess it's like a yellowish line.

MR. STRETTON: Do you want me to hold this up?

MR. PRIMAVERA: Then what you have is I-95.

THE COURT: I see it.

MR. PRIMAVERA: Then you have this area, which, in the testimony, differs. We called it no man's land but Mr. Jaffe said that there's some activity of people watching trains, but this is owned by the City.

This is zoned recreational, as is FDR Park, and then you have the area which is this purple which is owned by Conrail and then you have the area which is the Navy Yard or former Navy Yard, which is zoned LR. The railroad tracks are zoned recreational.

The no man's land, which is owned by the City, is zoned recreational and then obviously the park, and it leads to certain other issues. That was the ownership.

This is the zoning. So you will see recreational and then you will see recreational along the Conrail line and LR is really the primary zoning, which includes all the industrial activities, and then [23] you see the signs located here.

THE COURT: Where are the signs Located? A, B, C?

MR. PRIMAVERA: Yes. I think A starts closest to Broad Street, A, B, C and D.

It leads to a lot more interesting discussion because, clearly, under the terms of Philadelphia's own zoning ordinance, this is not, was not and cannot be recreational, and that's really not in dispute at all. I am comfortable saying that.

Your Honor has already hinted to the note difficult question, what does that mean, so I took the unusual step of going to the library because I wanted to make sure I knew what it meant.

We look at C&C Marine. I'm just passing up a whole list of cases. C&C Marine is a fascinating case. I'll take the liberty of explaining it briefly.

A barge company decided to put together some docks and fix barges in the river. The barges were clanking and the noise and it was an industrial activity. The barges were right next to residentially zoned property. So the township borough issued a violation saying you don't have a zoning permit.

[24]

Well, the attorney for the barge owners and for the dock said you know what, your zoning maps don't address this area, and the Court said you know what, this is unzoned. You have not exercised your legislative power.

You know, zoning comes at the expense of personal property rights and it's basically all of the protection, is in favor of the property owner, so if the Township missed the boat, either intentionally or unintentionally, no pun intended with these barges, they basically have resulted in property

which is not zoned, which means the private property rights are supreme, and that case is directly on point.

I will read briefly the point that I am trying to make here. "Our review of the zoning map shows that the Ohio River does not contain any dots or diagonal lines to indicate any type of zoning classification. Therefore, we must conclude that the borough has not used its zoning power to regulate that property." It's says "The restriction on the use of the property will not be extended by implication."

That's an important term. You can't use any rationale. There's another case. You can't use any rule of reason on this because it is of the [25] legislative aspects and even though that was exactly next to residential property, where the Court could have taken the position and said you know what, it's next to residential property, we are going to draw by implication, because it would be totally unfair to have this banging all night long, the Court said we can't help you. You know, it's unzoned.

So that's one case. That really paves the way. A second one is this Borough of Akron, which is even more interesting. I knew about C&C before I filed with the Zoning Board but the Borough of Akron, I'm quite actually happy with myself that we found that because Burough of Akron is even a harsher case when it comes to the other side.

What happened there was the Borough of Akron had a typical provision that said any property which is annexed immediately under our ordinance becomes R-1, which is single family dwelling.

The Court said you know what, nice try, but each property must be separately zoned by ordinance. So your I guess you would call it fail safe provision doesn't work. It's void ab initio and now the property is unzoned.

This is fascinating because you know [26] what, it shows you that the law, you know, nothing new under the sun. The protestants argued that you know what, there's an estoppel. The guy bought the property and developed the property ten years ago and never contested the R-1 zoning, and right in the record, it's great, the response to the two Zoning Board members that raised this, they said first of all, you know, why didn't you mention it before plus you have taken advantage of it under the R-1 and they said you know what, there's no estoppel.

Basically, it can be raised at any time and it's just a tremendous case because it says that even though they tried to zone this property through this default provision, they ended up with unzoned property, and thebottom line was that any restriction would be in lieu of the private property owner's rights.

THE COURT: Well, assume that I conclude, as this case did, in the Borough of Akron, that no ordinance was ever effectively enacted, pursuant to the borough code, okay.

The key word there is "effectively" because, obviously, they did enact an ordinance but the ordinance that they enacted was misdrafted and, [27] therefore, it could not have designated this as recreational since it is not public land.

So if I conclude that no ordinance was ever effectively enacted pursuant to the City Code, as to this specific property, all right, where does that leave me? That's the question.

MR. PRIMAVERA: That's where it becomes more interesting because the Borough of Akron, they kind of tell us.

They say at the end, because suppose we took the provision that, through whatever bureaucratic nightmare -- the zoning Board actually says bureaucratic nightmare. I'm not gonna say. Just through inadvertance, could we now do something there like put the world's biggest sign because the city messed up. Could we put a hundred foot by a hundred foot sign.

THE COURT: Let's stay away from a sign. Can you build anything you wanted on that property. Let's stay out of signs for a second because they are going to argue that the sign statute is a very specific designation, which is different.

MR. PRIMAVERA: And they are wrong about that. We will get to that.

[28]

THE COURT: If this is unzoned and I came in and said I wish to build --

MR. PRIMAVERA: A pigsty.

THE COURT: A pigsty is a nuisance. I want to build a high rise building right here and the neighbors say you can't build that kind of building right here. I mean, you know, I would say it's unzoned, I have a right to do anything I want with my property That's your basic argument.

MR. PRIMAVERA: With certain limitations because, basically, the Court realizes that because this is so strict and so unforgiving to the municipality and the protestants, there's got to be some I guess, I don't want to say rule of reason because they rejected the rule of reason, but there's got to be some measuring stick that they can use and in the Opinion, it talks about at the end of the day, what type of relief, and it says that you still have to comply, with the building code and other regulations of the borough.

So what we say is excluding zoning --

THE COURT: You exclude zoning, there might be other building regulations.

MR. PRIMAVERA: -- we need a building [29] permit to build these, signs, to make sure they are safe, to make sure they don't invade the floodplain.

I am looking for the language. I'm not finding it. I will look at the headnote, which is always dangerous.

THE COURT: It's here.

MR. PRIMAVERA: Regs.

THE COURT: "Although we conclude the property is unzoned, this determination does not grant landowners carte blanche to develop the property as objectors fear."

It does not eliminate the requirement that the landowner comply with general zoning and building code regulations. It did use the words "general zoning" and "building code regulations."

MR. PRIMAVERA: They talk about land development building procedures, storm water, erosion and sedimentation so that, basically, just because they goofed on the zoning, they can't avoid all these other codes.

THE COURT: The other things which might affect every single property.

MR. PRIMAVERA: Right. There are other cases, because I pursued this, because I was interested [30] the way the Court was, and what really is my free ride here, and we also looked at the exclusionary zoning cases where someone goes into the Township and says you don't have multi-family dwellings, you don't have affordable housing. Do you remember those cases?

THE COURT: Yes.

MR. PRIMAVERA: And those cases also talk about the same thing, and I will cite one or two of them here. It is interesting.

What they say is you are exempt as to zoning but if the soil, for example, is unable to support the dwelling, well, just

because there's exclusionary zoning, and you have a zoning remedy, we are not giving you a free pass on building in the floodplain so that these houses are going to get swept away and the people are going to drown.

There's one, Fernley (sic), 502. A.2d 585, Ehrlich (sic), 333 A.2d 239; and Scherr (sic), 456, A.2d 702. Those provisions say you come in, you attack on the face, the ordinance, because it doesn't provide for a class of use which is generally available in the state, and you then have cite specific relief out that doesn't mean that you can ignore or avoid other responsible codes and regulations.

[31]

As a matter of fact, one of the cases, can't remember which, even talk about like a car crushing scheme and all that, so those cases alert us to this.

Let's look at some of the other issues because they are equally interesting as far as I'm concerned. First of all, we have a comprehensive zoning scheme, and the comprehensive zoning scheme includes the 1991 regulations which made it more difficult to get the billboards, but it is not a separate scheme.

I think the Court was suggesting that. It is not separate. It is subject, to the variance criteria. It is part and parcel of the Zoning Code.

The fact is they have a legislative preamble. That is necessary because when you pass legislation, as your Honor knows, it has to have some rational basis but it is not like the

Criminal Code where it says you can't carry a gun without a permit.

It says you can't build a sign but then it says Subject to going through the variances, so to look at this differently than as part and parcel of the total Zoning Code is really, you know, not the correct way to do it.

[32]

Also, you are talking about the legislative history. They always talk about their portion of the legislative history. What about mine?

There's specific legislative history in their brief as an exhibit that talks about signs may be appropriate in commercial and industrial districts and also, under exclusionary zoning, even if they wanted to, they couldn't exclude billboards because then we would be having an exclusionary challenge here.

What they have done is make them so impossible to get that they may have done that but we have not brought a curative amendment or a challenge on the face of the ordinance.

We haven't done that because we haven't needed to do that but to give some special legislative importance to that preamble, first of all, is inconsistent with the total zoning ordinance but second, there's good language in there that says signs are permitted in appropriate places.

Where are they permitted? They are permitted uses in LR and G-2. So that's why we went to the trouble to have expert testimony say that if there hadn't been this quirky problem with the recreational, if you look at the adjoining properties, they're LR. [33] That's why we were suggesting that really this should be looked at in many respects, if you are not going to go through the M&M analysis, as LR.

THE COURT: Assume for a second that it was zoned LR. Would you be permitted to put up these signs?

MR. PRIMAVERA: No. That's because of the 1604 but I'm not there yet, your Honor.

Let's go back to 1989 and put the clock back, this case of Akron, which specifically deals with turning the clock backwards, and I think it gives us a legitimate basis to do that.

THE COURT: I have a copy of Akron here. Have I got your copy that you need?

MR. PRIMAVERA: Well, in that case, they specifically talk about the fact. that if it was void ab initio at the point where it's defective or deficient, and we would argue that that's prior to '89, it's when we took title, I think it was in '76, that's in the record, then basically the fact that we were -- what happened procedurally was this.

The applications were filed in '89. The Zoning Examiner said it's recreational so it's not permitted.

We then went to the Zoning Board. The Zoning Board, and you will see the exhibits in the record, said what do we do, and Councilwoman Verna said we are going to look into this, so the appeal at the zoning Board was withdrawn. It was never acted upon, but the appeal was taken. So we believe that since nothing happened, counsel had the opportunity to correct it, when we came in, we had the right to go back in effect to the '89, and that's just another argument we make.

I think if you read Borough of Akron, you will find more than sufficient legal basis for that.

Moving ahead to the argument about 1604, the billboards are permitted in LR and G-2 but there's a what I call spacing overlay that 1604 presents. You can't be so many feet from this, you can't be so many feet from that, and I think it's a complete Hertzberg analysis.

To answer the Court's question, luckily, I spent a few minutes this morning to go over, on a sign by sign basis, what the impediments in 1604 were because I think that if you are going to be fully understanding the entire issue, we need to have that in [35] the record.

If the Court will bear with me, we have that because all the signs are not equally impacted by the 1604 criteria, so the answer really is that they have to be looked at almost on a sign by sign basis.

I will just run through these. This is from the record with Mr. Tantala. Interestingly enough, each sign, A, B, C and D, is 14 by 48, which is acceptable because we stipulated to a reduction from the 20 by 60.

THE COURT: 14 by --

MR. PRIMAVERA: 48 feet in size.

THE COURT: So the size of them meets the 1604. The problem is their relationship to the highway.

MR. PRIMAVERA: Well, no. Your Honor, you are right. That's a problem for some of them. They are all 25 feet from the road surface. So the height is okay.

Obviously, these are designed to try to minimize inconsistency to the extent possible. Each one is not within 300 feet of residentially zoned property and that's what the code sets up.

Obviously, the testimony shows there's [36] no residential property anywhere near this but the code wants to look at 300 foot radius, so each one satisfies that.

Each one satisfies the fact that they're not within 500 feet of another sign. Each one is not within 600 feet of a bridge. So that's good.

A is not within 660 feet of the ramp but B, C and D are all within 660 feet of the ramp.

So the first one that jumps out at us is B, C and D are within 660 feet. So that would be a 1604 dimensional Hertzberg consideration if you get that far under this whole analysis.

THE COURT: How far are they?

MR. PRIMAVERA: I forget the testimony, but they're pretty close, the idea being that we only have I think 50 feet of width. This is a very long, narrow site.

As a matter of fact, the testimony from the Conrail representative was do we physically have property that would allow us to be 660 feet away, and the answer was no. There's insufficient property to do that, and that's a hardship because we could not build these signs on a narrow piece of property where we don't have the right 660 feet away to put the signs.

[37]

THE COURT: But the question that raises in my mind from Hertzberg is if you are 659 feet away, I think Hertzberg would speak to that.

Now, the question is how far away are they? Are they very far away? Are they very close?

MR. PRIMAVERA: They're very close.

THE COURT: Close to where?

MR. PRIMAVERA: They are close to the ramps.

MR. STRETTON: The specific distance Finding of Fact, Conclusion of Law 2, page 10 of the Zoning Board's decision, they tell you specific feet.

THE COURT: What are they?

MR. STRETTON: I didn't want to interfere with Carl's argument.

THE COURT: Just tell me.

MR. STRETTON: It goes proposes sign B is within 500 feet of the ingress/egress of Delaware Expressway. Sign C and D are within 300 feet of the egress and ingress of 1-95.

MR. PRIMAVERA: So we will have to check the actual record, but they're close.

THE COURT: "Close" meaning they're nowhere near 660 feet.

[38]

MR. PRIMAVERA: What we would argue is you look at the totality of the circumstances, and you look at the fact that this is part of the intermodal train yard, the Navy Yard and all the LR property, so if you are within a house, within ten feet, maybe, maybe that's more important.

We are suggesting no take downs for A, B, C and D, which is another requirement, but the testimony from the railroad was that they had taken 30 signs down for which they received no credit since 1991, when the ordinance came in.

Signs come down. Every time the train yard changes configuration, if they're gonna do something and the signs are in the way, they take them down, so I think there was more than abundant evidence in the record to talk about the take downs.

Then there were two other considerations. A is within 500 feet of FDR Park, and so is B.

So there the issue is since taking this as not recreational property, meaning our property, we are still within 500 feet of recreational property, but I think all that gets you is a determination because there's an inherent inconsistency.

[39]

If, as we all believe, this property should be zoned LR and G-2, and we had our land use planner testify to that, now the Court, by implication, can't wave a wand and say now it's G-2 and LR, you have to resist that temptation, but you can't blindly look at this and you have to say well, maybe it would be residential.

The obvious reality is under any zoning scheme that would make sense, it would be G-2 and LR and, basically, those classifications permit, as a permitted use, billboards, and it is only the 1604 overlay that gives you guidance as to where you should space them but, certainly, that's well within the Zoning Board's control.

We talk about the public interest, and there's another case in that group which is interesting because the SCRUB

case to me is strictly a case that talks about no record. Cindy Tedeski stood up and said there's a hardship here, and that was the total hardship testimony so, basically, Judge Doyle and his brethren were really talking about that case as a no record case.

Remember, all this is based upon the limited scope of review, error of law, abuse of [40] discretion, and I think what they were saying there is that the Zoning Board, on an attorney's comment, probably doesn't have sufficient record; whereas, look what we have done.

We have land use planners. We have engineers. We had all kinds of testimony, so to say that the Zoning Board didn't have adequate basis in the record is ludicrous, and the hardship, I'm sorry, not the hardship issue but the public policy issue, you can't take the preamble and take that as a finding of fact in every case because if that was the law, you would have exclusionary zoning as to billboards and it would mean your appeals to the Zoning Board are basically a nullity, so we look at this Colton Real Estate v. West Conshohocken.

This is a billboard case. It is in the bushes. It's Judge Craig in Montgomery County. This is a property that was landlocked due to condemnation. It's in a residential district. They reverse the Zoning Board on a few issues.

If you look at adverse effect on the neighborhood, page 1318, it says the record contains no substantial evidence to support the Board's implicit finding that a detriment to the public health, safety [41] and welfare would result.

They said yes, some people showed up and said we don't want to see Berma Shade signs on the Expressway. They say that started the billboard thing back in the early days, the 1900s. Some of the residents say why don't you go to West Chester or Coatesville. We don't want them here. Then even the Trial Judge says, he said of course, billboards are bad in the residential neighborhood. They said what's that mean. Even a trial Judge can't sua sponte. You know, they're a permitted lawful use.

So if you look at that, they basically say that the same burden that has to go on my findings has to go on the protestant's findings and for them to stand up and to say well, billboards are bad as a class, well, that's like people standing up saying bars are bad. I mean bars are a permitted use, so the game works both ways.

So what we are saying is that in conclusion, one, this is unzoned, which means anything that happens is in derogation of our protective property rights under the Pennsylvania Constitution.

Two, if you look at the Akron case, I do think we legally have the right to step back into [42] our shoes, in 1989, prior to the '91 amendment, in which case if this had been zoned either G-2 or LR in '89, there would have been no 1604 overlay and we would have gotten our permits in our pocket. The record is clear as to that and I think Akron helps us on that.

We were under no obligation to appeal it further. We were under no obligation to go to the legislature. We were under no obligation other than to protect our rights as we saw

fit to do so and then third, if we have to go through the more vigorous exercise, then basically what you would say is this should be treated as G-2 or LR, and then you are going to look at the Zoning Code as to signs and you are basically going to say they are a permitted use except for some of the spacing items, and if you look at this property, the spacing, we have done the best we can under the physical configuration of this property.

We are not choosing to ignore the property we own down here but we want to put it where it is going to get us the most money (indicating). We are putting it only where the physical contour of the property can accommodate it.

So in any one of those arguments, I think we are a winner here, keeping in mind there's a [42] big record. The Zoning Board findings are very specific and the SCRUB Case was really a no record case.

Thank you.

MR. STRETTON: Just a few comments. You know we always like to have the last word in these matters. I always take my hat off to Mr. Primavera. He is an excellent lawyer.

A couple things that even I think I want to point out. Let me work backwards. Mr. Primavera's suggestion that the record is devoid of any problems in the neighborhood is I think incorrect.

John Grady, who is the president of the Philadelphia Industrial Development Corporation, testified, pages 72 and 73, and he pointed out the great problems created by these

signs that were clearly visible. He said not only did they block an attractive site from the park standpoint and others, but they would prevent and inhibit the ability of the city to market adjoining land because of the signs. So there is very strong testimony.

The second testimony --

THE COURT: What adjoining land are we talking about?

[44]

MR. STRETTON: The Naval Yard, which is, as you know, in a state of flux and other areas.

THE COURT: Referring to the Navy Yard.

MR. STRETTON: And maybe other areas, but I don't think he was specific. He was talking about land that would be under the control of the Philadelphia Industrial Development Corporation, and I don't know all the specifics but certainly, the Naval Yard is in that particular area.

THE COURT: Okay. I believe that's what you are referring to because the city is attempting to revitalize the Navy Yard and get commercial development in there.

MR. STRETTON: Second, all the witnesses, including even Mr. Tantala, their expert, and Mr. Bucovotsky of Norman Day Associates, pursuant to the cross examination of Mr. Jaffe, concurred that these signs were clearly visible from the FDR Park in that particular area and there was further

testimony, if I recall, just indulge me one second, one of the individuals who has indicated that a number of neighbors even come and hang out in the area to watch the trains sitting in the FDR Park area. That's a recreational thing where people just come to watch the [45] trains go by, I guess train buffs or whatever. I'm trying to find that particular person.

THE COURT: Assume they do. I believe I also saw signs of people skateboarding underneath the highway.

MR. STRETTON: Yes. There's a park there if you look at the diagram.

THE COURT: I saw the pictures. I looked at Gray Smith's pictures. In there they show people skateboarding.

MR. STRETTON: The whole point is that there is this record is not devoid of testimony as to the effects not only on the park, the visibility, but also city development and the effects it will have on the surrounding land.

Second, going back to my, and we will hit some of these other issues, initial argument, all these signs, according to the Zoning Board's Conclusion of Law to which it has not been appealed, number three, are within 500 feet of FDR Park and violate Section 141604 (9)(M), and three of these signs, B, C and D are, according to the Zoning Board, violation of 1604 (9) (b) being 660 feet of the ingress and egress, and if you accept Mr. Smith's report, even sign A fits within that [46] category because of the Broad Street ingress and egress, according to his measurements in this particular area.

There's been no appeal of that. Mr. Primavera's suggestion that, as a matter of right, they are protected because in 1989 they filed an appeal and then withdrew it, at least under an existing case law as I understand it, does not make any sense. He withdrew that. He had ample opportunity or they had ample opportunity to pursue that. They chose not to. They came back now and are now pursuing it at a later date.

The case law that he cited, the Akron case, as your Honor pointed out, talks about what happens when you go back to no zoning but that's the situation, and it is clear that general zoning provisions still are applicable. You read the language yourself. That's what we are talking about.

THE COURT: Which would make 1604 applicable.

MR. STRETTON: Yes.

THE COURT: Okay. I don't think he argued any different than that. He argued that 1604 would be applicable to this but he then views that as a [47] dimensional problem with 1604 and talks about Hertzberg being applicable.

MR. STRETTON: And that's where we go our separate ways. You are going to have to make the decision. It is our position that it is not a permitted use when you have a strong prohibition, and keep in mind the strong public policy and public interest arguments not only by statute but pursuant to the - -

THE COURT: Except you say "strong public." The reason it gets so confusing to me is if this thing was 661 feet, it would have met 1604.

MR. STRETTON: For the one part, but you still have the 500 feet of FDR Park. There's two separate provisions that are clearly violated.

THE COURT: For the time being, let's eliminate that. Basically, we are talking about a dimensional problem.

MR. STRETTON: You are talking about a decision. They drew a line, and that line though is –

THE COURT: We are talking about a dimensional problem, sir, in that regard. I don't know how that bites here. I know you don't want it to be a dimensional problem. You want it to be a prohibitive [48] and look at their language and the reason for it.

MR. STRETTON: Dimensional would be if it said sign X, two feet by five feet, and he wants to put 10 by 15. This says no signs within 660 feet and the park. I'm sorry, you understand the issues of law as well as anyone.

MR. PRIMAVERA: Suppose it said you have to have a 15 foot setback, Sam. Right. So it says no –

THE COURT: Sir, let me deal with the issue of whether Hertzberg made a change in this or not. I don't know.

Is there something else you want to add?

MR. STRETTON: One other point if I could, your Honor.

MR. PRIMAVERA: Your Honor, while they are conferring.

THE COURT: Off the record.
(Discussion held off the record).

THE COURT: Mr. Stretton, anything you want to add?

MR. STRETTON: Nothing. Really nothing more, your Honor, than the arguments we already made.

[49]

I just wanted to give you the cites of some cases since Hertzberg. Perhaps you have those cases already. There's one case, Talkish v. Zoning Board where a community center was burnt down. They were rebuilding it but they were beyond the one year.

I wanted you to hear this language because I think it will help you, however you decide, because I think we have to bring it to your attention because they were arguing that it's dimensional and the Court agreed.

They indicated here, the community center is what they are trying to rebuild, is not a permitted use but is a conditional use and as such, the appellees argue that Hertzberg is not applicable but the Commonwealth Court then said because conditional uses are permitted uses, the standard

for granting dimensional variances set forth in Hertzberg is applicable.

I will hand up that Talkish case to you. I wanted you to see that. I think you have to look at that. My position is that this is not a conditional use and it is not a permitted use but I think you have to read that case because it's a more recent vintage since Hertzberg. It's one of the first [49] cases decided by the Commonwealth Court trying to figure out what Hertzberg really means in a non-Hertzberg fact scenario.

THE COURT: I read that case but I will read it again.

Thank you very much.

Mr. Primavera.

MR. PRIMAVERA: I have nothing further. I think the issues are going to be fun to explore. I hope you and your law Clerk enjoy it.

THE COURT: Off the record.
(Discussion held off the record)

(Hearing concluded)

CERTIFICATION

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the trial of the above cause, and that this copy is a correct transcript of the same.

/s/_____
Margie Canterino, RPR
Official Court Reporter
Court of Common Pleas
Philadelphia County

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APPENDIX J

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 1523 C.D. 2000

SOCIETY CREATED TO REDUCE URBAN BLIGHT (SCRUB), et al.,
Appellees,

v.

ZONING BOARD OF ADJUSTMENT OF THE CITY OF PHILADELPHIA and THE CITY OF PHILADELPHIA,
Appellees,

and

CONRAIL c/o TRANSPORTATION DISPLAYS, INC.,
Appellant.

BRIEF FOR APPELLANT CONRAIL c/o TRANSPORTATION DISPLAYS, INC.

Brief for Appellant

Appeal from the Order of the Court of Common Pleas of Philadelphia County, Pennsylvania, Dated May 26, 2000, in July Term, 1999, Nos. 3700, 3705, 3707 and 3712, Reversing the Decisions of the Zoning Board of Adjustment of the City of Philadelphia Dated July 6, 1999, in Nos. 99-407, 408, 409 and 410.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 42 Pa. C.S. § 762(a)(4) and Rule 341(a) of the Pennsylvania Rules of Appellate Procedure.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Where, as here, the Court of Common Pleas has not taken any additional evidence, this Court's review is limited to determining if the Zoning Board manifestly abused its discretion or committed an error of law. Allegheny W. Civic Council, Inc. v. Zoning Bd. of Adjustment of the City of Pittsburgh, 547 Pa. 163, 166, 689 A.2d 225, 227 (1997). An abuse of discretion may be found only if the Board's findings are not supported by substantial evidence. Larsen v. Zoning Bd. of Adjustment of the City of Pittsburgh, 543 Pa, 415, 421, 672 A.2d 286, 288-89 (1996). "Substantial evidence" is relevant evidence that a reasonable person might accept as adequate to support the Board's conclusions. Valley View Civic Ass'n. v. Zoning Bd. of Adjustment, 501 Pa. 550, 555, 462 A.2d 637, 640 (1983).

ORDER IN OUESTION

The order in question, entered by the Honorable Stephen E. Levin of the Court of Common Pleas of Philadelphia County, Pennsylvania, reads as follows:

> AND NOW, this 26th day of May, 2000, it is hereby ORDERED that this appeal is

GRANTED and that the decision of the ZBA dated July 6, 1999 is REVERSED.

BY THE COURT:

/s/ Stephen E. Levin

Hon. Stephen E. Levin

STATEMENT OF THE QUESTIONS INVOLVED

I. Whether the "Recreational" zoning classification of the property at issue in this matter is effectively a nullity because the property, by definition, cannot meet the express requirements of the Philadelphia Zoning Code to be zoned Recreational.

Suggested Answer: Yes.

Answered in the affirmative by the Court of Common Pleas.

II. Whether requests for variances from the Zoning Code's limitations on placement of outdoor advertising signs should be analyzed under the standards for dimensional variances set forth by the Pennsylvania Supreme Court in Hertzberg v. Zoning Bd. of Adjustment, 554 Pa. 249, 721 A.2d 43 (1998).

Suggested Answer: Yes

Answered in the negative by the Court of Common Pleas.

III. Whether the Zoning Board properly granted Appellant variances to erect outdoor advertising signs where substantial evidence supported the Board's findings that if the variances were denied Appellant would suffer an unnecessary hardship that was not created by Appellant and that the variances would not adversely effect public health, safety and welfare.

Suggested Answer: Yes.

Answered in the negative by the Court of Common Pleas.

STATEMENT OF THE CASE

Form of ActionIand Procedural History

This action arises out of the decision by the Zoning Board of Adjustment of the City of Philadelphia (the "Zoning Board") to grant appellant Conrail c/o Transportation Displays, Inc. ("Conrail") four variances, each allowing the erection of an outdoor advertising sign on property owned in fee simple by Conrail adjacent to I-95 in South Philadelphia (the"Subject Property"). The Subject Property is zoned "Recreational" despite the fact that the Philadelphia Zoning Code (the "Zoning Code") limits the Recreational designation to publicly owned lands. The improper and impermissible Recreational designation created the limitations on Conrail's use of its property that spawned the initial refusal of Conrail's plans by the Philadelphia Department of Licenses & Inspections ("L&I") and the appeals that have followed.

In 1989, Conrail submitted to L&I applications to erect four non-accessory, outdoor advertising signs on the Subject Property. (R.R. at 0300.a; 0304.a; 0309.a; 0311.a). L&I refused the applications solely because of the Subject Property's Recreational classification, which prohibits outdoor advertising signs. (R.R. at 0301.a; 0305.a; 0308.a; 0312.a). Conrail appealed L&I's refusals of the applications to the Zoning Board (R.R. at 0296.a - 99.a) but was led to believe that the Subject Property would be re-zoned by Philadelphia City Council to a permissible classification under the Zoning Code and withdrew its appeals. In the meantime, Philadelphia passed an ordinance in 1991 adding certain limitations on the placement of outdoor advertising signs, such as requiting that signs be set back 660 feet from ingress and egress ramps to certain highways and public parks and that new signs not be built without removal of an existing sign.

When the Subject Property had still not been rezoned, Conrail again filed four permit applications with L&I on March 26, 1999. (R.R. at 0017.a - 32.a). L&I denied the requested permits and issued refusals on March 26, 30, and 31, 1999. (R.R. at 0033.a - 36.a). The refusals were based on the Subject Property's Recreational designation, proximity to a public park and I-95 ingress and egress ramps, and lack of removal of a sign of equal or greater size for each proposed new sign. (Id.)

Conrail appealed the refusals to the Zoning Board (R.R. 0037.a - 40.a), which held a consolidated hearing on the four appeals on May 12, 1999, (R.R. at 0041.a- 13 l.a). Calling the zoning history of this property a"bureaucratic nightmare," the Zoning Board found that Conrail had demonstrated unnecessary hardship, and on July 6, 1999,

granted Conrail four variances to erect the signs. (R.R. at 0132.a - 135.a).

Appellees Society Created to Reduce Urban Blight ("SCRUB") and its President, Mary Cawley Tracy, Friends of FDR Park, Center City Residents Association ("CCRA") and Councilpersons Anna Verna and David Cohen filed an appeal of the Zoning Board's decisions to the Philadelphia Court of Common Pleas.[1] The Court of Common Pleas consolidated all four appeals and, without taking any

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[1] Friends of FDR Park and Council President Verna did not appear at the Zoning Board hearing, but joined SCRUB's appeal nonetheless. Indeed, Council President Verna previously expressed her support for a re-zoning of the property to remove the inappropriate Recreational designation. (R.R. at 0293.a). There is nothing in the record as to what Friends of FDR Park is, who its members are or what its interest in this ease is. SCRUB, Tracy, CCRA and Councilman Cohen have no direct interest effected by the Zoning Board's decision and base their standing to pursue this litigation solely on their status as taxpayers.

None of the Appellees reside within the immediate vicinity ofthe Subject Property. As such, they are not "aggrieved" parties within the traditional standing analysis in zoning cases. However, appellees evidently have standing as taxpayers under a recent decision by this Court. See Society Created to Reduce Urban Blight v. Zoning Bd. of Adjustment, 729 A.2d 117 (Pa. Commw. Ct. 1999). Appellees object to the very nature of outdoor advertising and raised objections to the signs despite the fact that the signs would be far removed from residential neighborhoods (and nowhere near the homes of these individuals) and located in an area surrounded by railroad tracks and large industrial use buildings. Conrail continues to maintain that appellees lack standing to challenge Conrail's variances to erect the signs at issue.

additional evidence, on May 26, 2000, granted the appeals and reversed the decisions of the Zoning Board. (R..R. at 0248.a). While the lower court agreed that the Subject Property was improperly zoned and not subject to the limitations of the Recreational designation, it nonetheless held that the Zoning Code's setback and other associated requirements for outdoor advertising should be considered under the standard applied to use variances, rather than the standard applied to dimensional variances, and held that Conrail did not meet the standard for use variances because there was an active rail line running over the Subject Property.

On June 23, 2000, Conrail filed a timely notice of appeal to this Court. (R.R. at 0250.a).

Statement of Facts

The Property and the Surrounding Area

Conrail owns the Subject Property in fee simple pursuant to a deed dated March 1979. (R.R. at 0057.a). The Subject Property is a narrow strip of land approximately 55 feet wide and 2,700 feet long located south of I-95 and west of Broad Street in South Philadelphia. (R.R. at 0056.a). It has two active rail lines and is generally bordered by the Philadelphia Naval Shipyard to the south and I-95 to the north. (R.R. at 0058.a).

Some portions of Franklin Delano Roosevelt Park ("FDR Park") are located directly to the north and south of the Subject Property. (R.R. at 0058.a; 0083.a). FDR Park is publicly owned land under the jurisdiction of the Fairmount

Park Commission and the City of Philadelphia Department of Recreation and is used, in part, for recreational purposes. (R.R. at 0215.a). Like the Subject Property, an elevated stretch of I-95 that runs parallel to the north side of the Subject Property bisects FDR Park. Near the property and the park are ingress and egress ramps from Broad Street to I-95.

FDR Park extends tmdemeath the elevated road surface of I-95, and the portion of FDR Park lying directly under I-95 is used as a parking area and by skateboarders. (R.R. at 0059.a, 0070.a). This portion of FDR Park is separated from the Subject Property by a fence that is incomplete in spots. The park here is intersected by the Hollander Creek Culvert. To the east of the culvert, the park is covered in scrub vegetation and debris. To the west of the culvert is woodlands. Directly west of FDR Park is the Philadelphia Solid Waste Transfer Station and a large petroleum tank farm. Philadelphia's Stadium District is east of the park.

The portion of FDR Park located to the south of the Subject Property is abandoned and, rather than for recreational purposes, it is used as an open air parking lot. (R.R. at 0070.a). Directly to the south of this portion of the park is the Navy Yard.

The Proposed Signs

Conrail seeks to erect on the Subject Property four double-faced, "V" shaped, non-accessory, outdoor advertising signs, measuring 14' in height and 48' in width, to advertise to vehicles traveling on I-95. The signs would be positioned in a horizontal row across the length ofthe Subject Property.

(R.R. at 0060.a). Three of them would be within 660 feet of an ingress or egress ramp to or from I-95, and all four would be within 660 feet of FDR Park. Each of the signs would be positioned so that the apex of each sign would be directed towards FDR Park and the faces of the signs almost perpendicular to I-95. (R.R. at 0061.a - 62.a). The bottoms of the signs would be approximately twenty-five feet above I-95's elevated road surface. (R.R. at 0062.a).

The Zoning Board adopted expert engineering testimony that demonstrated that the signs would not be visible to FDR Park users. As Mr. Tantala, the engineering expert, explained -- and the Zoning Board found -- if viewed from a distance in the park, the signs would appear merely as "dots on the horizon" and would blend into the background with the tall masts of the ships docked at the Navy Yard. (R.R. at 0064.a; 0071.a - 72.a). By the same token, as Mr. Tantala explained and the Board found, the signs' elevations would cause them to disappear from view at closer distances. The Zoning Board also adopted expert testimony demonstrating that the proposed signs would have no negative impact on the Subject Property, the surrounding area or traffic safety on I-95.

As Conrail's representative testified at the Zoning Board hearing, outdoor advertising signs are complementary uses of railroad property. Conrail has removed over thirty signs from its properties in the City of Philadelphia in the last ten years without having built any new signs.

SUMMARY OF ARGUMENT

Appellant Conrail owns the Subject Property in fee simple. Nonetheless, the Subject Property was erroneously designated "Recreational" by the City of Philadelphia in contravention of the express requirements of the Zoning Code. Based upon this erroneous designation, Conrail was denied permits to erect four outdoor advertising signs on its property. Because the property cannot be zoned Recreational and because of the inconsistency between Philadelphia's Zoning Map and the Zoning Code, the "Recreational" designation is a nullity. As a result, the Subject Property is unzoned, it is not subject to the zoning restrictions on outdoor advertising signs, and outdoor advertising signs are a permitted use of the Subject Property.

Because outdoor advertising signs are a permitted use of the Subject Property, the variances Conrail sought from the setback and other outdoor advertising requirements are dimensional variances. It is within the discretion of the Zoning Board to grant dimensional variances where it finds an unnecessary hardship and that a reasonable adjustment of the Zoning Code is warranted to allow the property owner to use the property for a permitted use without adverse impact on the public health, safety or welfare. Based upon well-settled Pennsylvania law and the substantial evidence presented, including a showing of unnecessary hardship resulting from the City's erroneous classification of the Subject Property, the Zoning Board acted within its discretion in granting the variances to Conrail. Further, Conrail is entitled to the variances as a matter of right as of the date it initially filed for permits to erect outdoor advertising signs on the Subject Property.

ARGUMENT

I. The Court of Common Pleas Committed an Error Of Law in Reversing the Zoning Board's Grant of the Variances.

Pursuant to well-established Pennsylvania law, where the Court of Common Pleas does not conduct a hearing or receive additional evidence that was not presented to the Zoning Board, the applicable standard of appellate review is whether the Zoning Board committed an abuse of discretion or an error of law in granting the requested variance. Hertzberg v. Zoning Bd. of Adjustment of the City of Pittsburgh, 554 Pa. 249, 255-56, 721 A.2d 43, 46 (1998). The Court may only find an abuse of discretion where the Zoning Board's findings are not supported by substantial evidence. Id. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id., citing, Valley View Civic Ass'n, 501 Pa. at 555, 462 A.2d at 640. Here, the findings of the Zoning Board are plainly supported by the substantial evidence presented by Conrail.

The Zoning Board did not abuse its discretion in granting Conrail variances to erect the four signs on the Subject Property. The City's improper Recreational designation of the Subject Property is a nullity, rendering the properly effectively unzoned, with no use restrictions. Because of the history of the Subject Property, the surrounding industrial uses and the lack of any adverse impact on the area, including FDR Park, the Zoning Board was within its discretion in granting Conrail variances from the Zoning Code's dimensional requirements for outdoor

advertising signs. Accordingly, this Court should reverse the Court of Common Pleas and affirm the grant of the variances by the Zoning Board to Conrail.

II. The Subject Property Is Not Zoned Because the "Recreational" Zoning Designation Is a Nullity.

It is undisputed that Conrail owns the Subject Property in fee simple. As such, the Subject Property cannot, by definition, be zoned Recreational and its current zoning designation is a nullity.

The Zoning Code specifically provides that only certain types of land may be designated Recreational in the City of Philadelphia:

> 14-701. Recreational Districts.
>
> (1) Parcels of ***public land*** under the jurisdiction of the City of Philadelphia Department of Recreation, Fairmount Park Commission, the Department of Forests and Waters of the Commonwealth of Pennsylvania, and the National Park Service of the United States Government which are devoted to park and/or recreational purposes may be designated on the zoning maps as Recreational.

Phila. Code, § 14-701 (emphasis added) (attached hereto as Exhibit 1). Since the Subject Property is not "public land," not under the jurisdiction of one of the specified governmental entities, and not devoted to park or recreational purposes, but is owned in fee simple by Conrail and used for railroad

purposes, it cannot be zoned Recreational and its current zoning status is plainly erroneous.

Under Pennsylvania law, such an erroneous designation is a nullity and Conrail's property rights in the Subject Property are not diminished because of the City's mapping error. A municipality has the duty to create zoning maps which clearly and rationally delineate zoning district boundaries so that landowners such as Conrail can rely upon predictable content within the zoning code and map to determine their right to use their property and to erect structures. See, e.g., C&C Marine Maintenance Corp. v. Zoning Hearing Bd. Of Georgetown Borough, 686 A.2d 896 (Pa. Commw. Ct. 1996); Tohickon Valley Transfer, Inc. v. Tinicum Township Zoning Hearing Bd., 97 Pa. Commw. 244, 509 A.2d 896 (1986). Any determination that Conrail's rights in the Subject Property are subject to the restrictions imposed upon land zoned Recreational would contravene Pennsylvania law.

A. Pennsylvania Case Law Supports a Determination that the Subject Property Is Not Zoned.

Pennsylvania case law supports a determination that the Subject Property is not zoned. In C&C Marine, 686 A.2d at 897, the borough passed a zoning ordinance regulating land use and adopted a map indicating the two types of districts in the borough -- commercial and residential, indicated respectively by diagonal lines or dots on the zoning map. None of the rivers or other waterways within the borough were designated on the zoning map as either commercial or residential.

Following the passage of the zoning ordinance and the adoption of the zoning map, C&C Marine, a barge repair business, obtained permits from the Army Corps of Engineers to build four docks on the Ohio River; however, it did not seek or obtain permits from the borough. C&C Marine used the docks to moor barges in the operation of its business.

The borough's zoning officer issued a cease and desist order to C&C Marine demanding that it terminate all mooring activities at the four docks in the Ohio River. The zoning officer claimed that C&C Marine violated the borough's zoning ordinance, Which prohibited operating a commercial business in a residential district without a permit. Id. The zoning hearing board concluded that the four docks were zoned residential because the portion of the river in which the docks were located was adjacent to land that was zoned residential. Id. at 898.

C&C Marine appealed the determination of the zoning hearing board to the Court of Common Pleas, which reversed the issuance of the cease and desist order. Id. On appeal by the zoning hearing board, this Court affirmed the Court of Common Pleas, holding that the Ohio River was unzoned since it was not designated on the zoning map as either residential or commercial because it had neither dots nor diagonal lines. As such, the borough could not regulate C&C Marine's use of the Ohio River since the borough's zoning ordinance and map did not provide predictable content upon which property owners could rely in determining where they could develop structures on the river. Id. at 899.

As in C&C Marine, in this case, Philadelphia's Zoning Code and the designation of the Subject Property as

Recreational failed and continues to fail to provide predictable content upon which Conrail can rely in determining its rights in utilizing the Subject Property. The Subject Property, by the Zoning Code's own definition, ***cannot*** be zoned Recreational As a result of this unavoidable inconsistency between the provisions of the Zoning Code and the Recreational classification of the Subject Property, the Subject Property is unzoned, and restrictions that ordinarily apply to Recreational property cannot be imposed upon Conrail in determining its rights to erect structures on the Subject Property.

Similarly, in In re. Appeal of Borough of Akron, 159 Pa. Commw. 420, 633 A.2d 1244 (1993), this Court also addressed the rights of a property owner with respect to land that was not properly zoned. There, the Borough of Akron enacted an ordinance annexing a tract of land owned by Weaver into the borough. At the time of the annexation, the borough's zoning ordinance provided for illegal, automatic assignment of a single family zoning designation, R- 1, to the annexed land. Although the borough failed to pass an ordinance specifically assigning a zoning classification to the property, the borough's zoning map identified the property as R-1.

Following the annexation, Weaver sought a building permit to construct multi-family dwellings on the property. The zoning board determined that the property was unzoned because there was no ordinance establishing a zoning classification for the property, despite the property's R-1 classification on the zoning map. Id. at 424, 633 A.2d at 1246. Accordingly, the zoning board directed the issuance of the requested permit. On appeal, the Court of Common Pleas and this Court rejected the argument that the borough's zoning

map had the legal effect of zoning the property R-1 and affirmed the zoning board's determination that the property was unzoned. Id.

Like in Borough of Akron, here, the Subject Property has never been properly zoned. To the contrary, the Subject Property ***could not*** be zoned Recreational because it does not meet the express requirements for land in Philadelphia to be zoned Recreational. Furthermore, as this Court held in C&C Marine, zoning restrictions cannot be "extended by implication" to property not zoned properly by a municipality. 686 A.2d at 899.

Both C&C Marine and Borough of Akron stand for the proposition that where land has an erroneous zoning designation, such a designation is ineffective and renders the land unzoned. Here, because the Subject Property cannot, under the express terms of Philadelphia's Zoning Code, be zoned Recreational, that designation is ineffective and the Subject Property is unzoned.

B. Because the Subject Property Is Not Zoned, It Is Not Subject to the Zoning Code's Restrictions On Outdoor Advertising Signs.

Because the Subject Property is not zoned, it is not subject to the Zoning Code's restrictions on the placement of outdoor advertising signs. As the Supreme Court has explained, zoning ordinances, being in derogation of the fundamental rights of property owners, "must be liberally construed and interpreted broadly so that a landowner may have the benefit of the broadest possible use of the land."

Southco, Inc. v. Concord Township, 552 Pa. 66, 70, 713 A.2d 607, 609 (1998).

Section 1604 of the Zoning Code, which supplied the basis for the lower court's decision, expressly provides that it "supplement[s] the provisions of this Title [the Zoning Code]." Phila. Code, § 14-1604 (attached hereto as Exhibit 2). Since the Subject Property is not zoned - that is, not subject to any provisions of the Zoning Code -- § 1604, liberally construed in favor of property owners, cannot be a "supplement" to it with respect to property not subject to the Zoning Code. Thus, § 1604 creates no obstacle to Conrail's proposed signs, and Conrail was entitled to building permits as a matter of right.

III. Because Outdoor Advertising Signs Are Permitted Uses of Unzoned Property in Philadelphia, the Variances Sought by Conrail From the Setback and Other Outdoor Advertising Requirements Are Dimensional Variances.

As demonstrated above, the Subject Property is unzoned since its Recreational classification is plainly in error and therefore a nullity. As such, outdoor advertising signs are permitted uses of the Subject Property. Further, this Court and the Supreme Court have allowed variances under appropriate circumstances to landowners to erect outdoor advertising signs. See, POA Co. v. Findlay Township Hearing Bd., 551 Pa. 689, 713 A.2d 70 (1998); Poster Advertising Co. v. Zoning Bd. of Adjustment, 408 Pa. 248, 182 A.2d 521 (1962); H.A. Steen Indus., Inc. v. Zoning Hearing Bd. of Bensalem Township, 39 Pa. Commw. 451,396 A.2d 66 (1978). Consequently, Conrail needs only a

dimensional variance - not a use variance - from the setback and other requirements of the Zoning Code. The Court of Common Pleas, however, erred as a matter of law by requiring Conrail to meet the higher burden for supporting a use variance.

The Zoning Code allows property owners to erect outdoor advertising signs on their property provided the criteria set forth in the Zoning Code are met. As such, the erection of such signs is a permitted use of property under the Zoning Code.[2] Accordingly, the variances sought by Conrail are ***dimensional*** variances. Where a property owner such as Conrail seeks to use its property for a permitted use but does not meet all of the zoning ordinance's criteria for that use, a dimensional variance will allow for "a reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with the applicable regulations." Talkish v. Zoning Hearing Bd., 738 A.2d 50, 52 (Pa. Commw. Ct. 1999), quoting, Hertzberg, 554 Pa. at 257, 721 A.2d at 47.

Indeed, at least one Court of Common Pleas has held requests for variances from setback, spacing and other similar requirements for placement of otherwise permitted outdoor advertising signs are dimensional variances properly analyzed under Hertzberg. In Keystone Outdoor Advertising Co. v.

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[2] Even assuming that the Subject Property should be considered to have a zoning classification rather than being unzoned, its proper classification would be either G-2 Industrial or LR Least Restricted. Since outdoor advertising signs are permitted uses in both of these zoning classifications, Conrail needs only a dimensional variance to erect the signs on the Subject Property under any conceivably permissible designation.

Zoning Hearing Board, No. 99-13344 (C.P. Del. 2000) (attached as Exhibit 3), the court affirmed the grant of variances for an outdoor advertising sign in the City of Chester by applying the Hertzberg standard to Chester's setback and spacing requirements.

This Court should adopt a similar approach. Here, Conrail does not seek to use the Subject Property in a manner not allowed by the Zoning Code. To the contrary, Conrail seeks only to use the Subject Property for a permitted use, with a reasonable adjustment of the Zoning Code's regulations. Therefore, Conrail sought and received from the Zoning Board dimensional variances and not use variances, and the lower court incorrectly reviewed the variances under the higher standard reserved for use variances.

IV. The Zoning Board May Grant Dimensional Variances Where It Finds an Unnecessary Hardship and That a Reasonable Adjustment of the Zoning Code Is Warranted to Allow the Property Owner to Use the Property for a Permitted Use Without Adverse Impact on the Public Health Safety or Welfare.

The Supreme Court of Pennsylvania set forth the standard required for a landowner to establish entitlement to a dimensional variance in Hertzberg v. Zoning Bd. of Adjustment of the City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998). "When seeking a dimensional variance within a permitted use, the owner is asking only for a reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with the applicable regulations. Thus, the grant of a dimensional variance is of

lesser moment that the grant of a use variance." Id. at 257, 721 A.2d at 47.

In Hertzberg, the applicant sought zoning approval to convert a vacant building into office space, counseling rooms, and living quarters. Since the intended use of the property was permitted under the zoning code, the applicant was seeking a dimensional variance and not a use variance. The zoning board granted the request for a variance and special exception. This Court reversed, finding that the applicant had failed to prove that without the variance and special exception, the property could not be used for any of the sixty-five different uses permitted by the zoning ordinance. Id., at 256, 721 A.2d at 46. In doing so, this Court concluded that the applicant had failed to demonstrate sufficient hardship required for the grant of a variance. Id.

On appeal, the Supreme Court addressed the issue of whether the evidence presented to the zoning board demonstrated the existence of unnecessary hardship. In reversing this Court's determination, the Supreme Court held that this Court had erred in requiring unnecessary hardship to be shown by proving that the property at issue could not be used for any other permitted purpose. Id. Rather, the Court vested zoning boards with significant discretion to grant dimensional variances based on the evidence presented and consideration of multiple factors, including the characteristics of the property and the surrounding neighborhood, economic detriment to the applicant if the variance were denied and any other factors relevant in a particular case. Id. at 264, 721 A.2d at 50.

A. The Nature of the Subject Property and the Surrounding Area Supports the Grant of the Variances.

The Subject Property is located in a generally industrial district, dominated by the Navy Yard, I-95 and the Philadelphia sports stadiums. The Subject Property is home to active rail lines and the overall neighborhood is industrial in character, where outdoor advertising is not offensive or unexpected.

The property also is adjacent to portions of FDR Park, an urban park situated by I-95, active rail lines and the Navy Yard. (R.R. at 0058.a; 0083.a). However, based upon substantial expert engineering and land use planning testimony, the Zoning Board expressly found that the proposed signs would not have an impact on FDR Park and its users.[3] Because this conclusion was supported by ample testimony, the Zoning Board was within its discretion to draw such a conclusion in Support of its grant of the requested variances.

In addition, the Zoning Board found no adverse impact on public health, safety or welfare. The proposed signs will not effect I-95 traffic safety, as the Zoning Board found on the basis of expert traffic studies submitted, and do not impact

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[3] Indeed, considering FDR Park's location next to I-95, the Navy Yard and the stadiums, all with their attendant noise, congestion and pollution, it is hard to imagine how four signs on the far side of an elevated highway could be a significant further intrusion on whatever tranquility may prevail in the park.

any other public concern.[4] Since this finding also was supported by substantial testimony, the Zoning Board acted within its discretion to adopt it and it further supports the Zoning Board's decision.

B. L&I's Refusal to Grant the 1989 Applications Because ofthe Erroneous Zoning Designation of the Subject Property Resulted in an Unnecessary Hardship to Conrail.

L&I's refusal to grant the 1989 applications because of the erroneous designation of the Subject Property as Recreational continues to act as an unnecessary hardship to Conrail. As set forth in section II above, the Subject Property cannot be classified as Recreational because it is not public land but is held in fee simple by Conrail. Nonetheless, L&I refused the 1989 applications solely because of the improper designation of the Subject Property. Had it not been for this erroneous classification, the 1989 applications would have

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[4] Specifically, the Zoning Board concluded that Conrail

> persuasively established that its proposals would not have a negative impact on the public heath, safety and welfare. In particular, the Zoning Board is persuaded that the proposed outdoor advertising signs, due to their elevation and position, would not impede the view from FDR Park. In addition, the traffic study report established that the safety of persons driving on I-95 would not be jeopardized by the proposed signs.

(R.R. 0140.a; 0155.a; 0163.a; 0170.a).

been granted as of right without the need for variances, and Conrail would have erected the four signs over ten years ago.

Pennsylvania law provides that zoning regulations may not be imposed "on a landowner in the untrammeled use of his property," and the power to enact zoning regulations "does not extend to an arbitrary, unnecessary or unreasonable intermeddling with the private ownership of property." Landis v. Zoning Bd. of Adjustment of Hatfield Township, 414 Pa. 146, 149, 198 A.2d 574, 575 (1964), Further, zoning ordinances are in derogation of the common law and should be construed to afford landowners such as Conrail the broadest possible use and enjoyment of their property. Bakerstown Container Corp. v. Richland Township, 508 Pa. 628, 500 A.2d 420 (1985). The Pennsylvania Constitution also protects Conrail's right to the enjoyment of its private property, as landowners should be permitted to utilize their own land as they see fit. Pa. Const. Art. 1 § 1; see also Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

By L&I's refusal to issue the requested permits, Conrail was deprived of its right to use its property even though the Zoning Code allowed for such a use. This result is plainly contrary to Pennsylvania law since the Zoning Code allowed outdoor advertising signs to be placed on land such as the Subject Property. The erroneous classification of the Subject Property as Recreational has resulted in the type of"arbitrary, unnecessary [and] unreasonable intermeddling" the Supreme Court has held impermissible. The only reason Conrail has been unable to utilize the Subject Property as it chooses ***and*** in a manner consistent with the Zoning Code is because of the erroneous designation of the Subject Property as Recreational. It is clear that the Zoning Code is not

intended to prevent landowners from using their property in a manner consistent with its express provisions. Nonetheless, the Zoning Code itself and the record evidence in the matter demonstrates that this is precisely what has happened with respect to Conrail's use of the Subject Property.

The record evidence presented to the Zoning Board supports the determination that the improper classification of the Subject Property resulted in unnecessary hardship to Conrail. The person who filed the 1989 applications for Conrail testified that the *only* reason L&I refused the 1989 applications was because the Subject Property was zoned Recreational. (R.R. at 0219.a). As the Zoning Board held, when Conrail initially applied for variances in 1989, Conrail

> may have been issued permits as a matter of right if the zoning classification for the subject property had not been improperly designated as Recreational. When [Conrail] attempted to rectify the error in zoning, additional regulations were added to the Code which have placed further restrictions on [Conrail]'s proposal for the subject property. In other words, a bureaucratic nightmare has prevented [Conrail] from making full use of its property resulting in an unnecessary hardship.

(R.R. at 0140.a; 0155.a; 0163.a; 0170.a). The Zoning Board was within its discretion in considering the inequitable consequences to Conrail of the City's error in designating the Subject Property Recreational as an additional unique circumstance justifying relief in the form of dimensional variances.

Furthermore, Conrail did not cause the unnecessary hardship which arose as a direct result of the erroneous zoning classification of the Subject Property. Conrail had no control and played no part whatsoever in the Subject Property improperly being zoned Recreational. Moreover, Conrail was led to believe that the Subject Property would be re-zoned to a proper classification by Philadelphia City Council. Conrail reasonably relied upon this belief, all the while intending to erect outdoor advertising signs as permitted by the Zoning Code. However, because the Subject Property was and continues to be erroneously classified Recreational, in direct contravention of the express language of the Zoning Code, Conrail has been unable to utilize the Subject Property in a manner otherwise permitted by the Zoning Code. It is plain that Conrail did not cause this resultant unnecessary hardship.

C. Conrail Will Suffer Unreasonable Interference with Its Use ofIts Property ifthe Variances Are Denied.

In support of its request for the variances, Robert Orlando of Transportation Displays, Inc., Conrail's agent, testified with regard to the utilization of Conrail's property throughout the country. (R.R. at 0102.a). Mr. Orlando explained that it is Conrail's policy to use its property nationwide for outdoor advertising because "[i]t's a hand-in-hand use and it fits in nicely with the rail use and the two work very, very well together." He further testified that it has always been and remains Conrail's intention to place advertising signs on the Subject Property. (R.R. at 0103.a). Mr. Orlando also testified that Conrail has not erected a single outdoor advertising sign in the City of Philadelphia since 1991 - the year the ordinance was passed placing additional

restrictions on the placement of outdoor advertising signs in the City. (R.R. at 0107.a). Not only has Conrail not added any outdoor advertising signs on its property in Philadelphia, it has removed thirty such signs. (R.R. at 0104.a).

A landowner such as Conrail should be able to utilize its property in any manner permitted by the Zoning Code. There is nothing in the Zoning Code to suggest that a landowner must choose a single permitted use as the only use to which its property will be put. However, the Court of Common Pleas restricted Conrail's ability to utilize the Subject Property by determining, without support, that Conrail must only use the Subject Property for a single use even though other uses- specifically outdoor advertising- are permitted by the Zoning Code. Here, outdoor advertising is a permitted use of the Subject Property. As such, Conrail is entitled to use the Subject Property for outdoor advertising, notwithstanding the fact that a rail line runs over the Subject Property.

If Conrail is unable to place the outdoor advertising signs on the Subject Property, it will be unable to follow its national practice and lose income that would otherwise be generated from such signs, all as a result of the City's error in classifying the Subject Property as Recreational. Under the Supreme Court's standard as set forth in Hertzberg, this detriment to Conrail supports the Zoning Board's determination that Conrail will suffer unnecessary hardship if the variances are not granted.[5]

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[5] Additionally, the record supports the Zoning Board's determination that the variances granted were the minimum necessary to afford relief to Conrail. Larsen, 543 Pa. at 421,672

It is plain from the evidence introduced before the Zoning Board that Conrail satisfied the standard set forth by the Supreme Court in Hertzberg, that it has suffered unnecessary hardship from the Zoning Code and that the proposed signs are not detrimental to the public health, safety or welfare. Accordingly, the Court should hold that the Zoning Board did not abuse its discretion and reverse the court below.

V. Conrail Is Entitled to the Variances as a Matter of Right as of the Date of the 1989 Applications.

Conrail originally applied for the four permits *prior to* the 1991 amendments to the Zoning Code that created the restrictions on the location of outdoor advertising signs. As Mr. Tantala testified, had the Subject Property not been erroneously and irrationally designated Recreational at the time Conrail applied for the permits, the permits would have been issued as a matter of right, without the necessity of obtaining relief from the Zoning Board.

Conrail should not be made to suffer because of the City's erroneous zoning designation. If the Subject Property had a proper zoning designation in 1989 as either LR Least Restricted or G2 General Industrial, the four permits would have been issued to Conrail as a matter of right and the signs would have been constructed. Conrail's right to erect signs in 1989 should not be erased by the City's error. Accordingly, Conrail was and remains entitled to erect the signs as a matter of right as of the date of the 1989 applications.

A.2d at 289.

CONCLUSION

For all of the foregoing reasons, appellant Conrail c/o Transportation Displays, Inc. respectfully requests that the Court reverse the decision of the Court of Common Pleas of Philadelphia County and reinstate the decisions of the Zoning Board of Adjustment of the City of Philadelphia wanting appellant four variances for the erection of outdoor advertising signs on the Subject Property.

Dated October 24, 2000

Respectfully submitted,

/s/ _____

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APPENDIX K

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. _____ EAL 2001

SOCIETY CREATED TO REDUCE URBAN BLIGHT (SCRUB), FRIENDS OF FDR PARK, ANNA C. VERNA, COUNCILMAN DAVID COHEN, MARY CRAWLEY TRACY, and CENTER CITY RESIDENTS ASSOCIATION,
Respondents

v.

ZONING BOARD OF ADJUSTMENT OF THE CITY OF PHILADELPHIA and THE CITY OF PHILADELPHIA,
Respondents

and

CONRAIL c/o TRANSPORTATION DISPLAYS, INC.,
Petitioner

PETITION FOR ALLOWANCE OF APPEAL OF CONRAIL c/o TRANSPORTATION DISPLAYS, INC.

Petition for Allowance of Appeal from the Order of the Commonwealth Court of Pennsylvania Entered April 26, 2001, at No. 1523 C.D. 2000, Affirming the Order of the Court of Common Pleas of Philadelphia County, Pennsylvania, Dated May 26, 2000, in July Term, 1999, Nos. 3700, 3705, 3707 and 3712, Reversing the Decisions of the

Petition for Allowance of Appeal

Zoning Board of Adjustment of the City of Philadelphia Dated July 6, 1999, in Nos. 99-407, 99-408, 99-409 and 99-410.

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APPENDIX:

EXHIBIT A: Opinion and Order of the Commonwealth Court Of Pennsylvania filed on April 26, 2001

EXHIBIT B: Order and Subsequent Opinion of the Court Of Common Pleas of Philadelphia County, Pennsylvania Dated May 26, 2000 and September 5, 2000 Respectively

EXHIBIT C: Findings of Fact and Conclusions of Law of the Zoning Board of Adjustment of

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EXHIBIT D: Verbatim Texts of Pertinent Portions of Statutes, Regulations, and Ordinances Which This Case Involves

Sub-Exhibit 1 Philadelphia Zoning Code § 14-701
Sub-Exhibit 2 Philadelphia Zoning Code § 14-1604
Sub-Exhibit 3 Philadelphia Zoning Code § 14-1802
Sub-Exhibit 4 Pennsylvania Municipalities Planning Code, 53 P.S. § 10910.2
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REFERENCE TO OPINIONS BELOW

On April 26, 2001, a panel of the Commonwealth Court of Pennsylvania rendered an opinion by Judge Doris A. Smith in Society Created to Reduce Urban Blight (SCRUB), et al v. Zoning Board of Adjustment of the City of Philadelphia and the City of Philadelphia and Conrail c/o Transportation Displays, Inc., No. 1523 C.D. 2000, a copy of which is included with this Petition at Exhibit Tab "A." This opinion is not yet published in the Atlantic Reporter but is available on Westlaw at 2001 WL 421589 (Pa.Cmwlth.) and on Lexis at 2001 Pa. Commw. LEXIS 265. (Both versions are also attached at Exhibit Tab A). The Order and subsequent Opinion of the Court of Common Pleas for Philadelphia County, Pennsylvania, dated May 26, 2000 and September 5, 2000 respectively, in July Term, 1999, Nos. 3700, 3705, 3707 and 3712, are included with this Petition at Exhibit Tab "B." The Findings of Fact and Conclusions of Law of the Zoning Board of Adjustment of the City of Philadelphia dated July 6, 1999, in Nos. 99-407, 99-408, 99-409 and 99-410 are collectively included with this Petition at Exhibit Tab "C."

TEXT OF THE ORDER IN QUESTION

ORDER

AND NOW, this 26th day of April, 2001, the order of the Court of Common Pleas of Philadelphia County is hereby affirmed.

/s/ Doris A. Smith, J.
DORIS A. SMITH, Judge

QUESTIONS PRESENTED

1. In light of the Court's recent grant of allocatur to address the criteria for granting zoning variances, should the Court grant allocatur in the Instant Case, in which the same zoning issues are raised?

2. Should the Court review the panel decision below, which directly contravenes this Court's recent liberalization of the standards governing the granting of use and dimensional variances?

3, Should the Court review the panel's refusal to consider any criteria except physical limitations on the Subject Property when determining whether a hardship warranting a zoning variance exists?

4. Should the Court review the panel decision below, which, by unreasonably denying zoning variances, infringes on property rights in violation of the Due Process provisions of the Federal and State Constitutions?

5. Should the Court reverse the panel's restrictions on private property use based entirely on a zoning classification that the panel itself concedes is incorrect?

STATEMENT OF THE CASE

The Commonwealth Court, once again, has refused to follow this Court's clear mandates with respect to zoning classifications. Although paying lip-service to this Court's decision in Hertzberg v. Zoning Board of Adjustment of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998), the

Commonwealth Court panel below, in fact, contravened this Court's clear directive liberalizing the requirements for granting both use and dimensional variances. This Court recently granted allocatur in another appeal raising these same issues respecting Hertzberg's scope and meaning. Talkish v. Zoning Hearing Board of Harborcreek Township, 562 Pa. 631, 757 A.2d 366 (2000). The Court should likewise grant allocatur in the Instant Case so that it may reaffirm Hertzberg. As significant, the Court should review and reverse the decision below because it unquestionably infringes on property rights in violation of the Due Process provisions of the Federal and State Constitutions. Indeed, the Constitutional injury is all the greater because the panel's decision is based entirely on a zoning classification the panel itself acknowledged is improper.

Factual and Procedural History

This is a dispute respecting whether Conrail may erect four signs on its own property in a largely deserted, industrial area adjacent to I-95 in South Philadelphia. The Philadelphia Zoning Board of Adjustment ("the Zoning Board") granted Conrail the variances necessary to erect the signs. When the Philadelphia Common Pleas Court reversed, Conrail appealed to a panel of the Commonwealth Court which affirmed the denial of the variances, thus contravening this Court's decision in Hertzberg.

The Instant Petition followed.

The Industrial Area In Which Conrail Seeks to Erect Signs

Conrail proposes to erect the signs on property ("the Subject Property") it has owned in fee simple since March 1979. (R.R. at 0057.a). The Subject Property is a narrow strip of land approximately 55 feet wide and 2,700 feet long located south of I-95 and west of Broad Street in South Philadelphia. (R.R. at 0056.a). It has two active rail lines and is generally bordered by the Philadelphia Naval Shipyard to the south and I-95 to the north. (R.R. at 0058.a).

Some portions of Franklin Delano Roosevelt Park ("FDR Park") are located directly to the north and south of the Subject Property. (R.R. at 0058a; 0083.a). FDR Park is publicly owned land under the jurisdiction of the Fairmount Park Commission and the City of Philadelphia Department of Recreation and is used, in part, for recreational purposes. (R.R. at 0215.a). Like the Subject Property, an elevated stretch of I-95 that runs parallel to the north side of the Subject Property bisects FDR Park. (R.R. at 0059.a, 0139.a-0140.a). Near the Property and the Park are ingress and egress ramps from Broad Street to I-95. (R.R. at 0059.a, 0139.a).

FDR Park extends underneath the elevated road surface of I-95, and the portion of FDR Park lying directly under I-95 is used as a parking area and by skateboarders. (R.R. at 0059.a, 0070.a). This portion of FDR Park is separated from the Subject Property by a fence that is incomplete in spots. (R.R. 0070.a, 0095.a, 0109.a, 0140.a). The Park here is intersected by the Hollander Creek Culvert. (R.R. at 0059.a). To the east of the Culvert, the Park is covered in scrub vegetation and debris. (R.R. at 0084.a). To

the west of the Culvert is woodlands. (R.R. at 0085.a). Directly west of FDR Park is the Philadelphia Solid Waste Transfer Station and a large petroleum tank farm. (R.R. at 0099.a). Philadelphia's Stadium District is east of the Park. (R.R. at 0141.a, 0288.a-0289.a).

The portion of FDR Park located to the south of the Subject Property is abandoned and is used not for recreational purposes, but as an open air parking lot. (R.R. at 0070.a). Directly to the south of this portion of the Park is the Navy Yard. (R.R. at 0058.a).

The Proposed Signs

Conrail seeks to erect on the Subject Property four double-faced, "V" shaped, non-accessory, outdoor advertising signs, measuring 14' in height and 48' in width, to advertise to vehicles traveling on I-95. (R.R. 0060.a, 0141.a). The signs would be positioned in a horizontal row across the length of the Subject Property. (R.R. at 0060.a). Three of them would be within 660 feet of an ingress or egress ramp to or from I-95, and all four would be within 660 feet of FDR Park. (R.R. at 0062.a, 0141.a). Each of the signs would be positioned so that the apex of each sign would be directed towards FDR Park and the faces of the signs almost perpendicular to I-95. (R.R. at 0061.a- 0062.a). The bottoms of the signs would be approximately twenty-five feet above I-95's elevated road surface. (R.R. at 0062.a).

The Zoning Board Approves the Erection of the Signs

It is undisputed that the Subject Property is incorrectly zoned "Recreational." The Philadelphia Zoning Code limits

the Recreational designation to publicly owned lands. (Phila. Code § 14-701). Because Conrail owned the Subject Property, it obviously cannot be "Recreational." Nonetheless, when Conrail initially submitted its applications in 1989 to erect the signs at issue here, the request was refused by the Philadelphia Department of Licenses & Inspections ("L&I") solely because of the Subject Property's Recreational classification. (R.R. at 0137.a, 0301.a).

Conrail appealed L&I's refusals to the Zoning Board, which subsequently called the zoning history of the Subject Property a "bureaucratic nightmare." (R.R. at 0132.a-0135.a). During the pendency of that appeal, Conrail was informed that the City would re-zone the Subject Property to "Industrial" -- its proper classification. (R.R. at 0052.a-0053.a, 0066.a, 0293.a). Accordingly, Conrail withdrew its appeal and awaited the City's corrective action. (R.R. at 0296.a-0299.a, 0315.a). Rather than changing the Subject Property's classification, however, in 1991, the City amended its Zoning Code to impose additional restrictions on the placement of outdoor signs in "Recreational" areas. (R.R. 0140.a, 0155.a, 0163.a; 0170.a). See Phila. Code §14-1604.

In March 1999, Conrail again applied to L&I for permits to erect the four signs. (R.R. 0007.a-0032.a). L&I refused the permits, again based on the Subject Property's "Recreational" designation. (R.R. 0033.a-0036.a). Conrail appealed to the Zoning Board, which held a consolidated hearing on the four appeals on May 12, 1999. (R.R. at 0041.a-0131.a). At the hearing, Conrail demonstrated to the Zoning Board's satisfaction as follows:

(1). The proposed signs would not be visible to visitors at FDR Park: if viewed from a distance, the signs would blend into the background; if viewed up close, the elevation of the signs would cause them to disappear (R.R. 0064.a, 0071.a-0072.a, 0143.a);

(2). The Recreational zoning designation was not only erroneous because the Property is privately owned, it was improper because the "hostile environment" underneath the I-95 superstructure was clearly not safe for recreational use. ("The Board cannot begin to imagine how a railroad property with three (3) sets of active tracks could have otherwise been designated as Recreational. Who would want their children or family pets playing in such as area?"). Instead, the Subject Property should have been zoned either Least Restrictive or General Industrial (R.R. 0090.a-0094.a, 0143.a-0149.a);

(3). City representatives represented to Conrail that the Subject Property would be re-zoned by City Council and that therefore there would no need to appeal the erroneous Recreational zoning classification (R.R. 0052a-0053.a, 0066.a);

(4). The proposed signs would not impair the Subject Property, the surrounding area, or traffic safety (R.R. 0090.a-0094.a, 0143.a-0144.a);

(5). The erroneous Recreational zoning classification deprived Conrail the ability to use the Subject Property in accordance with its policy nationwide of using its property for outdoor advertising, resulting in the significant loss of income that would have been generated from the signs (R.R. 0102.a-0103.a, 0143.a-0149.a); and

(6). Conrail had not added any more signs in Philadelphia since the City enacted its additional sign restrictions in 1991, and had, in fact, removed thirty signs (R.R. 0104.a, 0107.a, 0143.a-0149.a).

Based on these conclusions, the Zoning Board concluded that Conrail had demonstrated unnecessary hardship, and, on July 6, 1999, granted four variances to erect the signs. (R.R. at 0132.a-0135.a).

The Society Created to Reduce Urban Blight ("SCRUB"), the Friends of FDR Park, the Center City Residents Association, and others appealed the Zoning Board's decision to the Philadelphia Common Pleas Court, which reversed. The Honorable Stephen Levin agreed that the Subject Property was not properly zoned:

> This Court does not dispute that the property was incorrectly zoned. Clearly a piece of land such as the one concerned in this matter, which has functional and active railroad tracks, does not fit under the criteria for land which is to receive "recreational" zoning under the City of Philadelphia Zoning Code § 14-701(1).

(September 5, 2000 Opinion by the Honorable Stephen Levin (Exhibit B) at R.R. 0261.a).

Significantly, Judge Levin did not even acknowledge this Court's decision in Hertzberg. Rather, he simply ruled, inter alia, that the Zoning Board wrongly concluded that Conrail had shown unnecessary hardship. (R.R. 0261.a).

The Commonwealth Court Contravenes Hertzberg

Conrail appealed Judge Levin's decision to a panel of the Commonwealth Court (Smith, Pellegrini, J.J.; Jiulante, S.J.). Conrail argued, inter *alia*, as follows:

1. Under Hertzberg, Judge Levin erroneously reversed the Zoning Board's grant of the variances.

2. Judge Levin's application of restrictions on the use of "Recreational" areas was illegal and improper as to land Judge Levin agreed was not properly designated as "Recreational."

3. When the proper zoning classification -- "Industrial" -- is applied, then the variances at issue are plainly "dimensional," not "use," variances. Once again,

under Hertzberg, Judge Levin improperly reversed the Zoning Board's granting of these variances.

Remarkably, the panel below, in an opinion by the Honorable Doris A. Smith, although acknowledging Hertzberg, actually contravened that decision. For instance, Judge Smith deemed "frivolous" Conrail's attempt to show that the "hardship" caused by denial of the variances was "economic hardship." (Panel Opinion, 2001 Pa. Commw. LEXIS at *9). Rather, Judge Smith effectively limited the panel's consideration of hardship criteria to those caused by physical limitations on the Subject Property. (Id. at *7-*8). Thus, in Judge Smith's view, as long as Conrail could make any use of any portion of the Subject Property -- no matter how wasteful of the remainder of the Property -- it was not entitled to a variance. (Id. at *5, *10). Yet, this is exactly the zoning standard this Court rejected in Hertzberg.

This Court recently granted allocatur to clarify once more the zoning standards it set out in Hertzberg. Talkish, 562 Pa. at 631, 757 A.2d at 366. Conrail submits that just as in Talkish, the Instant Case raises the questions of whether the Court meant what it said in Hertzberg. Accordingly, Conrail urges the Court to grant allocatur and make clear that the Commonwealth Court must follow this Court's holdings and mandates.

REASONS FOR GRANTING ALLOCATUR

I. THIS COURT RECENTLY GRANTED ALLOCATUR TO REVIEW THE VERY ZONING ISSUES RAISED HERE

In August of last year, this Court granted allocatur in a case raising the same questions respecting use and dimensional variances as those in the Instant Petition. In these circumstances, the Court plainly should grant allocatur here as well. See Com. v. Sanderson, 517 Pa. 478, 480, 538 A.2d 870, 871 (1987) (granting allocatur where the Court had granted allocatur in another case raising same issues).

In Talkish v. Zoning Hearing Board of Harborcreek Township, 738 A.2d 50 (Pa. Commw. 1999), a property owner sought a variance from zoning restrictions that required a proposed building to be setback a hundred feet from the property lines. Id. at 51. The zoning board granted the variance, and, on appeal, the trial court reversed, stating that owner failed to prove that the property could not be used for any other use under the zoning ordinance and thus had failed to meet the burden for a variance. Id. The Commonwealth Court reversed the trial court's decision, holding that because the case involved setbacks and thus a dimensional variance, the trial court should have applied the more relaxed standard for unnecessary hardship that was set forth by this Court in Hertzberg v. Zoning Hearing Board of Adjustment of the City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998). The Commonwealth Court specifically held that, under Hertzberg, the trial court erred in requiring the property owner to prove that the property could not be used for any other use under the ordinance.

Petition for Allowance of Appeal

On August 28, 2000, this Court granted allocatur limited to the following issue:

> Whether this Court's holding in Hertzberg v. Zoning Hearing Board of Adjustment of the City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1980, 1998) which applied a relaxed evidentiary standard for dimensional variances, overrules the requirement that an applicant for a variance present substantial evidence of all five requirements set forth in the Municipal Planning Code, 53 P.S. § 10910.2 (a) (1)-(5)?

Talkish, 562 Pa. at 632, 757 A. 2d at 366-67.

The panel below relied on grounds that this Court is considering in Talkish. In denying the requested variance from the setback requirements, the panel required Conrail to satisfy the requirements set forth in both the Pennsylvania Municipalities Planning Code (53 P.S. § 10910.2 (a) (1)) and the Philadelphia Zoning Code (§ 14-1802(1)(a)) that the applicant demonstrate unnecessary hardship as a result of "physical conditions." (Panel Opinion, 2001 Pa. Commw. LEXIS at *6-*7). The panel held that because "any impropriety in the property zoning classification is not a unique physical circumstance and condition," Conrail "could not provide the unnecessary hardship required to grant a variance." (Id. at *8).

Significantly, in Talkish, this Court is considering whether Hertzberg overruled this and the other requirements in § 10910.2 (a) of the Municipal Planning Code. Indeed, in Hertzberg this Court held that the lower courts were not so

limited but "may consider multiple factors including the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood." 554 Pa. at 264, 721 A.2d at 50. As the Court did in Talkish, this Court should grant *allocatur* here to review whether the grounds relied upon by the panel below have been overruled by its decision in Hertzberg.

II. THE PANEL DECISION BELOW CONTRAVENES THIS COURT'S DECISIONS IN HERTZBERG AND OTHER CASES

The Court should grant allocatur because the panel below has contravened Hertzberg and other decisions of the Commonwealth Court itself. See Pope v. Gibbs, 561 Pa. 147, 748 A.2d 1234 (2000) (allocatur granted to determine whether lower court's decision conflicted with previous decisions of this Court and the Commonwealth Court); Allegheny West Civic Council, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh, 547 Pa. 163, 167, 689 A.2d 225, 227 (1997) (allocatur granted because of a conflict between the Commonwealth Court's zoning variance decision and other appellate decisions); Official Note (1) to Pa.R.App.P. 1114; Pennsylvania Supreme Court Internal Operating Procedure, Section V, Paragraphs (1) and (2).

As this Court has repeatedly stated, in reviewing land-use restrictions, "the courts must start with the basic proposition that absent more, an individual [has the constitutionally protected right] to utilize his own land as he see fit." Girsch Appeal, 437 Pa. 237, 241 n. 3, 263 A.2d

395, 397 n. 3 (1970). Therefore, "restrictions imposed by zoning ordinances are in derogation of the common law and at times of the liberties, rights, and privileges guaranteed by the Federal and State Constitutions and therefore must be strictly construed." See e.g., Appeal of Medinger, 377 Pa. 217, 221, 104 A.2d 118, 120 (1954); Appeal of Lord, 368 Pa. 121, 126, 81 A.2d 533, 535 (1951). Accordingly, courts are required to interpret permitted uses broadly under a zoning ordinance so as to allow a landowner the broadest possible and least restrictive use of the land. Southco, Inc. v. Concord Township., 552 Pa. 66, 76, 713 A.2d 607, 612 (1998); Pearson v. Zoning Hearing Board of Newlin Township, 765 A.2d 1187, 1189 (Pa. Commw. 2001). Any doubt concerning the scope of a permitted use or an ambiguity respecting its definition must be resolved in favor of an applicant. Allegheny Valley School v. Zoning Hearing Board of Slippery Rock Borough, 102 Pa. Cmwlth. 290, 294, 517 A.2d 1385, 1387 (1986); Desousa v. Zoning Hearing Board. of Whitehall Township, 19 Pa.Cmwlth. 367, 369, 339 A.2d 650, 652 (1975). The panel below nonetheless disregarded this Court's repeated mandate, and strictly interpreted the zoning ordinances and the permitted uses under the ordinances in the manner most restrictive to Conrail's property rights.

Rather than comply with this Court's mandate, the panel below subjected Conrail to an overly burdensome standard of unnecessary hardship that this Court rejected in Hertzberg. The Commonwealth Court in Hertzberg had applied the following "very strict standard" for variances: the property owner had to demonstrate unnecessary hardship by showing that the property was valueless without the variance and could not be used for any other permitted purpose. 554 Pa. at 258, 721 A.2d at 47. In reversing, this Court explicitly

rejected this strict standard, stating that, "*irrespective of the type of variance* [i.e., use or dimensional], the standard employed by the Commonwealth Court was overly strict and contravenes this Court's holding concerning unnecessary hardship." Id. (emphasis added). The Court further held that "a variance applicant was not required to establish that the property is valueless without the variance in order to establish unnecessary hardship." Id. at 259, 721 A.2d at 48. Rather, this Court held that when considering either a use or dimensional variance, the courts must take into account "multiple factors," including financial hardship, to determine unnecessary hardship has established." Id. at 260, 261, 721 A.2d at 48, 49 (citing Allegheny West Civic Council, Inc., 547 Pa. at 167, 689 A.2d at 227 (reversing Commonwealth Court's denial of use and dimensional variances) and Halberstadt v. Borough of Nazareth, 546 Pa. 578, 687 A.2d 371 (1997) (reversing Commonwealth Court's denial of use and dimensional variances)). See Daley v. Zoning Hearing Board of Upper Moreland Township, 2001 Pa. Commw. LEXIS 249, *9 (April 10, 2001) (affirming grant of variance to buffer zone requirements under Hertzberg standard where zoning board had determined that the "situation had become a serious hardship and had prevented the property owner from reasonable use of its property"); Talkish, 738 A.2d at 52 (under Hertzberg standard, trial court erred in requiring owner to prove it was impossible to develop property in conformity with setback requirements).

Remarkably, the panel below, in reviewing the Zoning Board's decisions, improperly held Conrail to the same strict standard for unnecessary hardship that this Court unequivocally rejected in Hertzberg. The Zoning Board below properly determined that: (1) Conrail had established

an unnecessary hardship as result of the "bureaucratic nightmare" created by the City's actions, including its improper zoning of the Subject Property as "Recreational;" (2) Conrail could have previously erected the signs but for the improper zoning; (3) the variances were the minimum necessary to afford relief; and (4) the proposed signs would not impair the public health, safety, or welfare. (Panel Opinion, 2001 Pa. Commw. LEXIS at *5; R.R. 0140.a, 0148.a, 0155.a, 0163a, 0170.a). The Zoning Board further concluded that Conrail had unequivocally satisfied the unnecessary hardship standard in Hertzberg respecting financial detriment, neighborhood characteristics, and related factors. These findings were certainly supported by substantial evidence, and the Zoning Board plainly acted within its discretion in adopting the findings and granting Conrail's variances.

The panel below nonetheless wholly disregarded the overwhelming evidence that Conrail had produced, and the Zoning Board had found conclusive, stating that "[t]he record in this case is devoid of any evidence whatsoever to support a finding of unnecessary hardship." (Panel Opinion, 2001 Pa. Commw. LEXIS at *11). Indeed, the panel apparently "rejected" the multiple factors Conrail had demonstrated under Hertzberg and even criticized Conrail's proof of financial hardship -- perhaps the key factor in Hertzberg -- as "wholly frivolous." (Id. at *9). Rather, the panel stated that "the unnecessary hardship must arise from the particular physical surrounding, shape, or topographical conditions of the specific structure or land involved" and that "the zoning board must find some unnecessary hardship arising from the unique physical circumstances or conditions of the lot before the zoning board may grant a variance." (Id. at *7, *9).

Contrary to the panel's decision, the Hertzberg Court held that in determining unnecessary hardship, the courts were not limited to physical conditions alone. Hertzberg, 554 Pa. at 264, 721 A.2d at 50. Remarkably, in Amoco Oil v. Ross Township Zoning Hearing Board, then President Judge Crumlish stated that "the necessary hardship for variance may be found not only in the properties' unique physical characteristics, but the true need to expand the use and response that dictates a business." 57 Pa. Cmwlth. 376, 426 A.2d 728 (1981) (citations omitted). Further, courts have repeatedly held that "the strict application of a zoning ordinance as a result of a mistake would result in a unnecessary hardship," justifying the grant of a variance. Polonsky v. Lebanon, 139 Pa. Commw. 579, 585, 590 A.2d 1388, 1391 (1991) (citing Moyerman v. Glanzberg, 391 Pa. 387, 138 A.2d 681 (1958)). See Minnick v. Zoning Hearing Board, Town of McCandless, 71 Pa. Commw. 333, 437, 455 A.2d 243, 250-51 (1983) (unnecessary hardship arose from ramifications caused by judicial construction of deficient zoning provisions); Ruddy v. Lower Southhamption Township Zoning Hearing Bd., 669 A.2d 1051, 1057 (Pa. Cmwlth. 1995) (unnecessary hardship arose from changes in zoning).

As has been shown, the panel below simply ignored these decisions, contravened Hertzberg, and limited its analysis to whether or not Conrail's hardship was caused by limitations on the Subject Property's physical characteristics. (Panel Opinion, 2001 Pa. Commw. at *7, *10-*11). This Court should grant allocatur to correct this gross error.

III. THE ENFORCEMENT OF A ZONING DESIGNATION THAT IS ACKNOWLEDGED BY ALL TO BE ERRONEOUS AND THAT CITY REPRESENTATIVES REPRESENTED WOULD BE REZONED VIOLATES CONRAIL'S DUE PROCESS RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTION

This Court should grant allocatur because the enforcement of the "Residential" zoning designation that all have acknowledged is erroneous, and which City representatives stated would be changed, violates Conrail's due process rights under the State and Federal Constitutions. See e.g., Com. v. Copeland, 563 Pa. 344, 761 A.2d 139 (2000) (allocatur granted to determine whether petitioner's constitutional rights were violated); Gwynedd Development Group, Inc. v. Department of Labor and Industry, 544 Pa. 218, 675 A.2d 1220, 1221 (1996) (allocatur granted to determine whether statute violated due process).

As stated above, a property owner has an "inherent and indefeasible" right to "utilize his own land as he sees fit" which is guaranteed in the United States and Pennsylvania Constitutions, and "requires that just compensation be paid for the taking of private property." Pa. Northwestern Distributors, Inc. v. Zoning Hearing Board. of Township of Moon, 526 Pa. 186, 193, 584 A.2d 1372, 1375 (1991) (citing Pa. Const. Art. I, §§ 1 and 10); Girsch Appeal, 437 Pa. at 241, 241 n. 3, 263 A.2d at 397, 397 n. 3 (referring to 5th and 14th Amendments of the Federal Constitution); Agins v. Tiburon, 447 U.S. 255, 260 (1980); Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 394 (1926). Given the fundamental rights at stake, courts will declare zoning

regulations unconstitutional as violative of substantive due process where they "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Id., 272 U.S. at 394. See Agins, 447 U.S. at 260 ("[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or [if it] denied an owner economically viable use of his land"); Colligan Zoning Case, 401 Pa. 125, 129, 162 A.2d 652, 653-54 (1960) (stating that a borough's interpretation of setback restrictions would be a unreasonable and thus unconstitutional interference of property rights where the restriction as applied to the specific property had no relation to safety, health or morals).

Courts in other jurisdictions have repeatedly held that a property owner's due process rights are violated as a result of unreasonable and arbitrary zoning when land-use restrictions are "permitted to remain in force," even though there is no reason to believe that "the necessity of regulation in the public interest outweighs, qualitatively, the impact imposed on the individual property owner." Alsenas v. City of Brecksville, 29 Ohio App.2d 255, 260-61, 281 N.E.2d 21, 24-25 (Ohio Ct. App. 1972); Huebner v. Village of Carrolton, Ohio, 1980 Ohio App. LEXIS 10467, *7 (Ohio Ct. App. December 30, 1980); Buskey v. Town of Hanover, 133 N.H. 318, 323, 577 A.2d 406 410 (1990) ("[w]hen the restriction as applied to a particular piece of land is unnecessary to accomplish a legitimate public purpose or the gain to the public is slight but the harm to the citizen and his [or her] property is great, the exercise of police power becomes arbitrary and unreasonable"). See Colligan Zoning Case, 401 Pa. at 129-32, 162 A.2d at 654-55 (setback

restrictions were unconstitutional with respect to subject property unless a variance were granted where the property undeniably did not raise any of the public concerns underlying the zoning restrictions).

Courts in other jurisdictions have further held that a claim for inverse condemnation may arise where property is erroneously classified and significant damage results. See e.g., Harris v. Missouri Conservation Commission, 790 F.2d 678, 681 (8th Cir. 1986); Harris v. Missouri Department of Conservation, 1988 Mo. App. LEXIS 1159, *15, 755 S.W.2d 726, 731 (1988); San Remo Hotel L.P. v. City and County of San Francisco, 83 Cal. App. 4th 239, 255, 100 Cal. Rptr.2d 1, 33-34 (Cal. Ct. App. 2000) (hotel stated takings claim where City had erroneously classified hotel rooms as residential, thereby precluding use of the hotel by overnight guests). In Harris, the Eighth Circuit and the Missouri Court of Appeals held that a property owner had properly stated a claim for inverse condemnation where he alleged that the Missouri Department of Conservation erroneously classified a lake on the property as state waters, thereby precluding the owner from using the lake for commercial fishing, diminishing the value of the land, and eventually resulting in the sale of the land. Harris, 790 F.2d at 681, 681 n.5 (dismissing federal action to allow property owner to pursue state claims for inverse condemnation); Harris, 755 S.W.2d at 729-731. Similar to the panel rulings below, the State in Harris argued that the owner's claims should be dismissed because he had not directly challenged the designation administratively or through a declaratory judgment. The Harris Court rejected these arguments, stating that the constitutional provisions protecting property rights were self-executing. Id. at 731.

In these circumstances, the property owner is entitled to just compensation in the amount of "the difference between the fair market values of the property under the different zoning classifications for the period during which it was classified improperly." Yuba Natural Resources v. United States, 10 Cl. Ct. 486, 501, 1986 U.S. Cl. Ct. LEXIS 833, *44 (1986) (citing Nemmers v. City of Dubuque, 764 F.2d 502, 505 (8th Cir. 1985)).

Similarly, in the case at bar, all the parties -- the Zoning Board, Judge Levin, and the Commonwealth Court panel -- all acknowledged that the Subject Property was improperly zoned as "Recreational." (Panel Opinion, 2001 Pa. Commw. LEXIS at *5). The panel nonetheless held that Conrail must comply with the requirements of this erroneous Recreational zoning classification. (Id. at *9-*10). Moreover, contrary to Harris, the panel stated that it was incumbent upon Conrail to seek a curative amendment or rezoning, and that the erroneous zoning designation must be enforced against Conrail until a curative amendment or rezoning is granted. (Id.).

The panel's continued enforcement of the admittedly incorrect Residential zoning classification is patently "arbitrary and unreasonable" and plainly bears no "substantial relation to the public health, safety, morals, or general welfare." Village of Euclid, 447 U.S. at 260. Similar to the circumstances the Alsenas Court found to be unconstitutional, there is simply no reason to believe that permitting the erroneous zoning classification to remain in force is necessary to the public interest or that any such public interest outweighs the impact imposed on Conrail. Indeed, the panel's decision contravenes this Court's decisions requiring the court to

resolve uncertainties in the interpretation of a zoning ordinance in favor of a construction which renders the ordinance constitutional. Upper Salford Township v. Collins, 542 Pa. 608, 610, 669 A.2d 335, 336 (1995). Consistent with Colligan Zoning Case, Village of Euclid, Alsenas, Harris, and the other cases discussed above, the panel's decision to continue enforcement of the erroneous Residential zoning classification against Conrail violates Conrail's substantive due process rights.

Further, the panel's decision plainly violates the "vested rights" that Conrail acquired a result of representations by City representatives that City Council would rezone the Subject Property from "Recreational" to its proper classification. This Court has repeatedly held that a property owner acquires "vested rights which are protected by the federal and state constitutions" where he has diligently acted in good faith and in detrimental reliance on erroneous actions or representations by zoning officials. Herskovits v. Irwin, 299 Pa. 155, 169, 149 A. 195, 197 (1930) (when property owner relied on good faith on municipality's action in granting a building permit, the subsequent revocation of the permit "would be nothing short of confiscation and disregard of constitutional rights"). See Petrosky v. Zoning Hearing Board of Upper Chicester Township, 485 Pa. 501, 507, 402 A.2d 1385, 1338 (1979) (citing Com. v. Flynn, 21 Pa. Cmwlth. 264, 272, 344 A.2d 720, 725 (1975)) (a property owner acquires a vested right as a result of mistaken government action where he shows (1) due diligence in attempting to comply with the law; (2) good faith throughout the proceedings; (3) expenditure of substantial unrecoverable funds; (4) the expiration without appeal of the period during which an appeal could have been taken; and (5) the use would

not adversely affect public health, safety or welfare). Indeed, the Commonwealth Court itself has held that a zoning board would be "estopped" from denying a variance on grounds that the use was not permitted, if it had represented to the landowner that it would grant a variance upon the rezoning of the property. Cicchiello v. Bloomsburg Zoning Hearing Board, 151 Pa. Cmwlth. 506, 511-512, 617 A.2d 835, 836-37 (1993).

Remarkably, contrary to this Court's decisions and Cicchiello, the panel below wholly ignored that Conrail was told by City representatives, including then Councilwoman Anna Verna, that City Council would correct the erroneous Recreational zoning classification and rezone the Property, and that Conrail withdrew its appeal of the Recreational zoning designation based on these representations. (R.R. 0066.a, R.R. 0293.a-0299.a). None of the parties, the Zoning Board, Judge Levin, or the panel below disputed that had City Council rezoned the Subject Property as represented, or had Conrail merely continued its appeal of the Recreational zoning classification, Conrail would have been able to erect the signs in or about 1989 -- approximately two years before the sign restrictions at issue were passed in 1991. (Id.). In these circumstances, the denial of Conrail's variances based on both the erroneous Recreational zoning classification and the 1991 sign restrictions which should never have applied to Conrail in the first place was "nothing short of [a] confiscation and [the] disregard of [Conrail's] constitutional rights." Herskovits, 299 Pa. at 169, 149 A. at 197.

Finally, under Pennsylvania law, property that has been incorrectly zoned is deemed "unzoned." See C.C. Marine Maintenance Corp. v. Zoning Hearing Board of

Georgetown Borough, 686 A.2d 896, 899 (Pa. Commw. 1996); In re Appeal of Borough of Akron, 159 Pa. Commw. 420, 424, 633 A.2d 1244, 1246 (1993). As stated above, in the absence of any zoning, a property owner has the constitutionally guaranteed right to use his land as he sees fit. Pa. Northwestern Distributors, Inc., 526 Pa. at 193, 584 A.2d at 1375; Girsch Appeal, 437 Pa. at 241, n. 3, 263 A.2d at 397 n. 3. Accordingly, because the Property was unzoned, the restrictions the panel seeks to enforce against Conrail would be "in derogation of" Conrail's protected property rights under the State and Federal Constitutions. Appeal of Medinger, 377 Pa. at 221, 104 A.2d at 120 ; Appeal of Lord, 368 Pa. at 126, 81 A.2d at 535

Once again, the granting of allocatur is fully warranted.

CONCLUSION

For all the foregoing reasons, Petitioner Conrail c/o Transportation Displays, Inc. respectfully requests that this Court grant this Petition for Allowance of Appeal.

Respectfully submitted,

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Dated: May 29, 2001

APPENDIX L

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 260 EAL 2001

SOCIETY CREATED TO REDUCE URBAN BLIGHT (SCRUB), FRIENDS OF FDR PARK, ANNA C. VERNA, COUNCILMAN DAVID COHEN, MARY CRAWLEY TRACY, and CENTER CITY RESIDENTS ASSOCIATION,
Respondents

v.

ZONING BOARD OF ADJUSTMENT OF THE CITY OF PHILADELPHIA and THE CITY OF PHILADELPHIA,
Respondents

and

CONRAIL c/o TRANSPORTATION DISPLAYS, INC.,
Petitioner

APPLICATION FOR RECONSIDERATION OF THE COURT'S ORDER DENYING THE PETITION FOR ALLOWANCE OF APPEAL OF CONRAIL c/o TRANSPORTATION DISPLAYS, INC.

Application for Reconsideration of the Order of the Supreme Court of Pennsylvania Entered November 20, 2001, denying the Petition for Allowance of Appeal of Conrail c/o Transportation Displays, Inc. from the Order of the Commonwealth Court of Pennsylvania Entered April 26,

Application for Reconsideration of Court's Order

2001, at No. 1523 C.D. 2000, Affirming the Order of the Court of Common Pleas of Philadelphia County, Pennsylvania, Dated May 26, 2000, in July Term, 1999, Nos. 3700, 3705, 3707 and 3712, Reversing the Decisions of the Zoning Board of Adjustment of the City of Philadelphia Dated July 6, 1999, in Nos. 99-407, 99-408, 99-409 and 99-410.

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Statutes, Regulations, and Ordinances

53 P.S. § 10910.2 (a) (1) 3
Pa.R.A.P 1123(b) 1

Other Authorities

3 Kenneth H. Young, Anderson's American Law of Zoning § 20.4880 (4th Ed. 1996)) 6

Application for Reconsideration of Court's Order

Pursuant to Rule 1123(b) of the Pennsylvania Rules of Appellate Procedure, Conrail c/o Transportation Displays, Inc. ("Conrail") respectfully moves this Court to reconsider its Order dated November 20, 2001, denying Conrail's Petition for Allowance of Appeal of the Order of the Commonwealth Court of Pennsylvania Entered April 26, 2001.

INTRODUCTION

The Commonwealth Court has flouted -- and continues to flout -- this Court's decision in Hertzberg v. Zoning Board of Adjustment of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998). The Commonwealth Court Panel here outright rejected the Court's directives in Hertzberg to take into account "multiple factors," including financial hardship, when determining whether the requisite unnecessary hardship for a use or dimensional variance had been established. Rather, the Commonwealth Court amazingly reverted back to the "no reasonable use" standard which this Court explicitly rejected in Hertzberg.

As this Court recognized in granting allocatur in Talkish v. Zoning Hearing Board of Harborcreek Township, 562 Pa. 631, 757 A.2d 366 (2000), the Commonwealth Court's utter disregard for the use and dimensional variance standards that this Court set forth in Hertzberg compels this Court's review. The Commonwealth Court Panel's disregard of the same variance standards here is no less compelling. Indeed, it is especially troubling that in a decision subsequent to the filing of Conrail's allocatur, the Commonwealth Court has actually begun citing its decisions in the "SCRUB" cases to "justify" its contravention of Hertzberg. Yeager v. Zoning

Hearing Board of City of Allentown, 779 A.2d 595 (Pa. Cmwlth. June 14, 2001. Plainly, this Court's review is needed.

Further, since Conrail has sought allocatur, courts throughout the country have unequivocally demonstrated that: (1) the Commonwealth Court Panel below plainly applied the wrong standard of unnecessary hardship to the dimensional variances here; (2) the undisputedly erroneous zoning classification here should have been invalidated, and Conrail should have been afforded the property rights it would have had if the Property had been properly zoned in the first place; and (3) the City's efforts to thwart Conrail based on the erroneous zoning classification constituted a taking in violation of the state and federal constitutions. In these circumstances, the Court's reconsideration is plainly warranted.

FACTUAL AND PROCEDURAL HISTORY

Conrail incorporates by reference the factual and procedural history set forth in the Statement of the Case contained in its Petition for Allowance of Appeal.

On November 20, 2001, this Court entered an Order denying Conrail's Petition for Allowance of Appeal. (See Exhibit "A"). To date, the Court has not rendered a decision in Talkish, in which it granted allocatur to review the same zoning variance issues raised here.

Application for Reconsideration of Court's Order

REASONS COMPELLING RECONSIDERATION

I. SUBSEQUENT TO CONRAIL SEEKING ALLOCATUR HERE, THE COMMONWEALTH COURT HAS CONTINUED TO FLOUT THIS COURT'S DECISION IN HERTZBERG

The Court should grant reconsideration because as the recent Commonwealth Court decisions only confirm, the Court's guidance is needed respecting the standards for dimensional variances set forth in Hertzberg v. Zoning Hearing Board of Adjustment of the City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1980). In Hertzberg, the Court held that to establish unnecessary hardship, "a variance applicant was not required to establish that the property is valueless without the variance and could not be used for any other permitted purpose." Id. at 259, 721 A.2d at 48. Rather, this Court held that when considering either a use or dimensional variance, the courts must take into account "multiple factors," including financial hardship, to determine unnecessary hardship has established." Id. at 260, 261, 721 A.2d at 48, 49.

Recognizing the need to address these significant issues, the Court in Talkish v. Zoning Hearing Board of Harborcreek Township, 562 Pa. 631, 632, 757 A.2d 366, 366-67 (2000), granted allocatur to review "whether this Court's holding in Hertzberg . . . which applied a relaxed evidentiary standard for dimensional variances, overrules the requirement that an applicant for a variance present substantial evidence of all five requirements set forth in the Municipal Planning Code, 53 P.S. § 10910.2 (a) (1) -(5)?" Although no decision has yet been reached by the Court in Talkish, the

Commonwealth Court Panel below ignored the standards set forth by the Court in Hertzberg and improperly subjected Conrail to the very same requirements of the Municipal Planning Code that the Court appeared to overrule in Hertzberg.

On June 14, 2001, (after Conrail sought allocatur in the instant case), the Commonwealth Court once again ran roughshod over the Court's decision in Hertzberg. Yeager v. Zoning Hearing Board of City of Allentown, 779 A.2d 595, 596-98 (Pa. Cmwlth. June 14, 2001). There, a property owner applied for variances, seeking, inter alia, to erect a sign within a setback area. Id. at 596. The zoning board granted the variances, finding that consistent with the standards set forth in Hertzberg, the property owner would suffer an economic hardship if required to conform to the ordinance. Id. at 597. The trial court reversed the zoning board, concluding that the owner had not satisfied its burden of demonstrating unnecessary hardship. Id. at 597. On appeal, the Commonwealth Court affirmed the trial court. Id. at 598. The Commonwealth Court explicitly rejected a line of the cases holding that as a result of the Hertzberg Court's "relaxation of the degree of hardship that will justify a dimensional variance," a dimensional variance may be granted when the zoning restriction financially burdens a property owner. Id. Although the Supreme Court in Hertzberg explicitly rejected the requirement that the property owner demonstrate unnecessary hardship by showing that the property could not be used for any other permitted purpose, the Commonwealth Court subjected the property owner to the "substantial burden" of demonstrating the property could not be used for any of the uses for which the property is zoned, not just the particular use the owner chooses. Id. Indeed, in

contravening Hertzberg, the Commonwealth Court based its decision in part on its prior erroneous decision in the "SCRUB"-Philadelphia Zoning Board cases, one of which is at issue here. Id. (citing Society Created to Reduce Urban Blight v. Zoning Board of Adjustment, 771 A.2d 874, 877, 2001 Pa. Commw. LEXIS 246, *8-*9 (Pa. Cmwlth. 2001)).

In these circumstances, the Court should grant reconsideration and correct the Commonwealth Court's continuing misguided application of the standards for dimensional variances set forth by the Court in Hertzberg, which the Court is presently considering in Talkish. See Com. v. Sanderson, 517 Pa. 478, 480, 538 A.2d 870, 871 (1987) (granting allocatur where the Court had granted allocatur in another case raising same issues).

II. VERY RECENT DECISIONS DEMONSTRATE THAT THE COMMONWEALTH COURT PANEL BELOW PLAINLY APPLIED THE WRONG STANDARD OF UNNECESSARY HARDSHIP TO THE DIMENSIONAL VARIANCES HERE

Since Conrail filed the instant allocatur petititon, courts in other jurisdictions have confirmed the wisdom of Hertzberg, holding that dimensional variances are subject to a more relaxed standard for measuring unnecessary hardship. See e.g., Wisconsin v. Outagamie County Board of Adjustment, 244 Wis. 2d 613, 630-645, 628 N.W.2d 376, 382-390 (Wis. June 29, 2001) (expressly overruling prior Supreme Court decision requiring all dimensional variance applicants to demonstrate no reasonable use of the property); Gilani v. Board of Adjustment of New Castle County, Civil Action No. 00A-07-009-JOH, 2001 Del. Super. LEXIS 309,

*9 (Del. Super. July 27, 2001) ("area [also known as dimensional] variances are subject to less stringent standards than use variance"; "an applicant must show 'exceptional practical difficulties' in order for the [Zoning] Board to grant an area variance"); Alviani v. Dixon, 365 Md. 95, 120, 775 A.2d 1234, 1248 (Md. Ct. App. July 13, 2001) ("the standards applied to [dimensional] variances are more relaxed than those applied to use variances"); Go v. Sugarcreek Township Board of Zoning, C.A. Case No. 2000 CA 66, 2001 Ohio App. LEXIS 2460, *8 (Ohio Ct. App. June 1, 2001) ("an application for [dimensional] variance must establish only practical difficulties, not unnecessary hardship"); Gormally v. Shiff, 188 Misc. 2d 873, 874, 729 N.Y.S.2d 880, 880 (N.Y. Misc. August 8, 2001) ("It is incumbent upon an applicant for [a dimensional] variance to demonstrate that strict compliance with the zoning ordinance will result in practical difficulties").

Indeed, the Wisconsin Supreme Court in Outagamie County Board of Adjustment recently reviewed -- and rejected -- the same improper dimensional variance standards which Conrail asks this Court to review and reject here. 244 Wis. 2d at 630, 628 N.W.2d at 382. In Outagamie, the Wisconsin Supreme Court revisited its prior decision in Wisconsin v. Kenosha County Board of Adjustment, 218 Wis. 2d 396, 577 N.W.2d 814 (1998), in which it held that both use and dimensional variances should be held to the same "unnecessary hardship" standard: " whether a reasonable use of the property is feasible without the variance." Outagamie, 244 Wis. 2d. at 634, 638 n 12, 628 N.W.2d at 384, 386 n. 12. The Wisconsin Supreme Court overruled its decision in Kenosha County, and explicitly rejected the "no reasonable use" standard with respect to dimensional variances. Id., 244

Wis. 2d at 633-34, 628 N.W.2d at 383-84. Instead, the Court stated that the proper standard for unnecessary hardship sufficient for the issuance of a dimensional variance was "whether compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome." Id., 244 Wis. 2d at 636-37, 628 N.W.2d at 385.

In rejecting the "no reasonable use" standard with respect to dimensional variances, the Court stated:

> The general rule throughout the United States recognized a distinction between the level of hardship required to justify area and use variance. "In most states, the courts will approve an area variance upon as lesser showing by the applicant than is requires to sustain a use variance."

Id., 244 Wis. 2d at 635-36, 628 N.W.2d at 385 (quoting 3 Kenneth H. Young, Anderson's American Law of Zoning § 20.48, at 580 (4th Ed. 1996)). The Court further held that requiring all area variance applicants to demonstrate that there is no reasonable use of the property without a variance "makes little sense," "runs a counter to the broader purposes of variance procedure," and raises constitutional concerns. Id., 244 Wis. 2d at 641, 643, 644, 628 N.W.2d at 387, 388, 389. Indeed, the Court stated that the rule established in Kenosha County "defies practicable workability, lacks sufficient justification, and is detrimental to the coherence of

the law of zoning in [Wisconsin]." Id., 244 Wis. 2d at 633, 628 N.W.2d at 383.

Similarly, consistent with its decision in Hertzberg, this Court should reject the "no reasonable use standard" applied to the dimensional variances here by the Commonwealth Court panel below.

III. VERY RECENT DECISIONS DEMONSTRATE THAT THE COMMONWEALTH COURT PANEL BELOW SHOULD HAVE INVALIDATED THE UNDISPUTEDLY ERRONEOUS ZONING CLASSIFICATION AND PERMITTED THE SIGNS

There is no dispute that the Property at issue was erroneously zoned. Very recent decisions demonstrate that the Commonwealth Court Panel below should have invalidated the undisputedly erroneous zoning designation and authorized Conrail's placement of the signs under previous ordinances. The Court recently invalidated similarly erroneous designations in Leiser v. City of Wildwood, No. ED79016, 2001 Mo App. LEXIS 1953 (Mo. Ct. App. November 6, 2001. There, a property owner sought to "transfer" property, which was located in City of Eureka, but had been erroneously designated as part of the City of Wildwood, to Eureka, under an ordinance allowing the transfer. Id. at *3. The City of Wildwood refused to allow the transfer because the property was designated -- albeit erroneously -- as part of Wildwood. Id. at *9. The City of Wildwood also maintained that the ordinance relied upon by the property owner to transfer the property did not apply here because the ordinance only applied to "counties of the first-class" and the relevant county -- St. Louis County -- was

not technically a "first-class county." Id. at *12-*13. The Court wholly rejected these spurious arguments. Id. at *9-*17. The Court found that as all the parties acknowledged, (1) there are no "first-class" counties in Missouri; (2) the ordinance was intended to apply to St. Louis County; and (3) the ordinance had merely erroneously designated St. Louis County as a "first-class county." Id. at *13. Accordingly, the Court invalidated the erroneous designation "to effectuate the intent of the legislature and to avoid an illogical and absurd result." Id. at *16.

A very recent New Jersey decision demonstrates that Commonwealth Court Panel below plainly erred by denying Conrail the statutory protection its Property would have received had it been correctly zoned in the first place. Goodfellows v. Washington Township Planning Board, No. A-2744-00T2, 2001 N.J. Super. LEXIS 416 (N.J. Super. November 14, 2001). There, a planning board denied the application of a property owner for preliminary site plan approval based upon the owner's failure to secure a drainage easement and to secure adequate storm water drainage. Id. at *1. The owner filed an action seeking to overturn the board's decision, and summary judgment was entered for the board. Id. at *2. An appeal was filed. Id. at *2-*3. During the pendency of the appeal, the township passed an ordinance that effectively prohibited the property owner from making the necessary drainage improvements to the Property. Id. at *3. On appeal, the New Jersey Superior reversed the trial court, holding that the planning board should have approved the preliminary site plan subject to the procurement of the drainage easement. Id. at *4. More importantly, because the preliminary site plan should have been approved in the first place, the Court held that "equity dictates that plaintiff should

have the benefit of the statutory protection against the subsequent change in use requirement, prohibiting . . . [the necessary drainage improvements at the Property], as if the preliminary site plan had been granted." Id. at *13-*14.

Similarly, in the case at bar, while Conrail was waiting for the City to correct its erroneous zoning designation (which its representatives had explicitly promised to do), the zoning ordinance was amended to prohibit the signs here. Even more compelling than situation in Goodfellows, all the parties and the Courts here acknowledge that the Property was erroneously zoned and that Conrail would have been entitled to erect the signs had the Property been properly zoned at the outset. Accordingly, under Goodfellows, "equity dictates that [Conrail] should have the benefit of the statutory protection against the subsequent change in [the zoning ordinance]," as if Property had been correctly zoned. In these circumstances, the Court should grant reconsideration and reverse the Commonwealth Court Panel's Order denying Conrail the statutory protections to which it was indisputably entitled prior to the change in the zoning code.

IV. VERY RECENT DECISIONS DEMONSTRATE THAT IN RELYING ON AN ADMITTEDLY ERRONEOUS ZONING CLASSIFICATION, THE ZONING BOARD'S ACTIONS CONSTITUTED A TAKING IN VIOLATION OF THE FEDERAL AND STATE CONSTITUTIONS

The Court should grant reconsideration because very recent decisions plainly demonstrate that any action by the zoning board in reliance on the undisputedly erroneous zoning designation constituted a "regulatory taking" in violation of

the federal and state constitutions. See e.g., A.A. Profiles, Inc. v. City of Fort Lauderale, 253 F.3d 576, 582 (11th Cir. June 5, 2001) (City's actions in refusing to allow permitted use and in later re-zoning the property constituted a taking in violation of the Fourteenth Amendment); North Olmstead Land Holdings, Ltd. v. Planning Commission of the City of North Olmstead, No. 776584, 2001 Ohio App. LEXIS 5038, *5-*6 (Ohio Ct. App. November 8, 2001) (planning commission's improper zoning designation of property and refusal to allow proper use of the property were unreasonable and arbitrary and amounted to an unconstitutional taking);Visconsi-Royalton, Limited v. City of Strongsville, No. 79206, 2001 Ohio App. LEXIS 4336, *10 (Ohio Ct. App. September 27, 2001) (unconstitutional taking occurs when "it is beyond fair debate that existing zoning classification is arbitrary, unreasonable, and bears no substantial relation to the public health, safety, morals or general welfare"). Cf. Chesterfield Village, Inc. v. City of Chesterfield No. ED78444 2001 Mo. App. LEXIS 787, *4 (Mo. Ct. App. May 9, 2001) (zoning classification was unreasonable and arbitrary and unconstitutional; municipality's refusal to rezone constituted a regulatory taking); Shaner v. Perry Township, 775 A.2d 887, 892-93 (Pa. Cmwlth. May 8, 2001) (township's zoning designation and refusal to issue permits constituted an unconstitutional taking).

In North Olmsted, the City rezoned plaintiff's property for office use only, and refused repeated requests by the plaintiff to rezone the property. 2001 Ohio App. LEXIS at *1-*2. Plaintiff filed an action to declare that the City's actions in both improperly designating the Property for office use and in proscribing other uses amounted to an

unconstitutional taking. Id. at *2, *6. The Court found that it was "beyond fair debate" that the City's zoning of the property was "arbitrary, unreasonable and not substantially related to the public health, safety, morals, or general welfare of the community." Id. at *6, *7. Further, the Court held that once the existing zoning was determined to be improper, the property should have been rezoned for a proper use "to avoid leaving the property in an unzoned classification." Id. at *9.

In the case at bar, there is no dispute whatsoever that the City's erroneous zoning designation of Conrail's Property was "arbitrary, unreasonable, and not substantially relate to the public health, safety, morals, or general welfare of the community." Nonetheless, as in North Olmstead, the City (despite promises to do so) refused to rezone the Property for its proper use, instead "leaving the property in an unzoned classification." Consistent with the very recent decision in North Olmstead, the City's actions and erroneous designation were unconstitutional and amounted to an illegal regulatory taking. In these circumstances, the Court should grant reconsideration and reverse the Commonwealth Court Panel's Order affirming these patently unconstitutional actions.

CONCLUSION

For all the foregoing reasons, Petitioner Conrail c/o Transportation Displays, Inc. respectfully requests that this Court grant its Application for Reconsideration of the Court's November 20, 2001 Order denying its Petition for Allowance of Appeal.

Application for Reconsideration of Court's Order

Respectfully submitted,

OBERMAYER REBMANN MAXWELL
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BY:/s/_____

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Dated: December 4, 2001

Supreme Court, U.S.
FILED
MAY 2 9 2003
OFFICE OF THE CLERK

No. 02-1578

In the Supreme Court of the United States

CONRAIL C/O TRANSPORTATION DISPLAYS, INC.,
Petitioner,

v.

SOCIETY CREATED TO REDUCE URBAN BLIGHT (SCRUB), THE CENTER CITY RESIDENTS ASSOCIATION, MARY CRAWLEY TRACY, PHILADELPHIA COUNCILWOMAN ANNA VERNA AND PHILADELPHIA COUNCILMAN DAVID COHEN
AND
THE ZONING BOARD OF ADJUSTMENT OF THE CITY OF PHILADELPHIA AND THE CITY OF PHILADELPHIA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

RESPONDENTS' BRIEF IN OPPOSITION

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10 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner waived the issues presented for review by not raising the issues in the lower courts?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The Petitioner, Conrail c/o Transportation Displays, Inc., was the Appellant below.

The represented Respondents who were the Appellees below are as follows:

Society Created to Reduce Urban Blight (SCRUB)

The Center City Residents Association

Mary Crawley Tracy

Philadelphia Councilman Anna Verna

Philadelphia Councilman David Cohen

There is no parent corporation. Society Created to Reduce Urban Blight (SCRUB) is a non-profit corporation, which has 501(c)(3) status with a business address of 1314 Chestnut Street Suite 750, Philadelphia, Pennsylvania, 19107.

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Statement of the Case

The Petitioner, Conrail c/o Transportation Displays, Inc., has petitioned for a Writ of Certiorari to this Honorable Court from the January 28, 2003 Order of the Supreme Court of Pennsylvania denying the Petition for Reconsideration of the Order of the Supreme Court of Pennsylvania dated November 20, 2001 denying the Petition for Allowance of Appeal. (1A-4A) The issues presented by the Petitioner were not raised in the Courts below and were waived.

The Petitioner wished to place large double-faced "V" shaped signs on property owned by Conrail and actively used for rail lines.

The procedural history is as follows: In 1989, Conrail had applied to the Philadelphia Department of Licenses and Inspections to obtain permission for the erection of four outdoor advertising signs on the property in question. The Philadelphia Department of Licenses and Inspections determined in 1989 that the advertising signs were not permitted since the area was zoned as recreational. No timely appeal was taken by Conrail.

In March 26, 1999, Conrail filed four separate applications for use permits to erect four double-faced V shaped signs. These signs were in direct violation of Philadelphia Zoning Ordinance 14-1604. These signs were located within 660 feet of major highway I-95. Three of the signs were located within 660 feet of a park and recreational facility. Two of the signs would be within 660 feet of a park within the Fairmount Park Commission. The Petitioner did not remove any existing signs. All of the above were areas

where signs were prohibited by Philadelphia Zoning Ordinance 14-1604.

The property in question was near the old Philadelphia Naval Yard. The property had two very active rail lines.

The application for these four signs were denied by the Philadelphia Department of Licenses and Inspections. The Petitioner then appealed to the Zoning Board of Adjustment in Philadelphia. A hearing before the Zoning was held on May 12, 1999. On July 6, 1999, the Zoning Board of Adjustment granted the variances for the four large billboard signs.

The Respondents, SCRUB, et al., filed an appeal in the captioned matter to the Court of Common Pleas of Philadelphia County on July 30, 1999. The only issue on appeal raised by the Respondents was whether the grant of the variance was an abuse of discretion. No cross appeal was filed.

A hearing was held on January 12, 2000, before the Honorable Stephen Levin of the Court of Common Pleas of Philadelphia County. On May 26, 2000, Judge Levin reversed the grant of the variances for the four billboard signs.

The Petitioner then filed a timely appeal to the Commonwealth Court of Pennsylvania. Oral argument was held in the Commonwealth Court. By Opinion dated April 26, 2001, the Commonwealth Court affirmed the decision of the Court of Common Pleas. (5A) The Commonwealth Court found there was no hardship to justify the variance. (13A)

The Petitioner then sought a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. This request was denied by the Pennsylvania Supreme Court by Order dated November 20, 2001. (4A) The Petitioner then sought reconsideration of the aforementioned denial. By Order dated January 28, 2003, the Pennsylvania Supreme Court denied the Petition for Reconsideration. (2A)

The Petitioner now has filed the present Petition for Writ of Certiorari.

Reasons for Denying the Writ

The Respondent, Society Created to Reduce Urban Blight (SCRUB), et al. respectfully request the Petition for Writ of Certiorari be denied since the Petitioner, Conrail, has waived the issues presented for review by not timely raising the issues in the lower courts.

The appeal from the Zoning Board of Adjustment by the Respondents raised only one issue. The issue in essence was whether the grant of the variance was a gross abuse of discretion since there was not hardship and the signs were against public policy. The signs were absolutely prohibited by Philadelphia Zoning Ordinance 14-1604. No cross appeals were taken by the Petitioner.

In the Brief filed by the Petitioner in the Commonwealth Court, the issues presented for review were as follows:

1. Whether the recreational zoning classification of the property at issue in this matter is effectively a nullity because the property, by definition, cannot

meet the express requirements of the Philadelphia Zoning Code to be zoned recreational.

2. Whether requests for variances from the Zoning Code's limitations on placement of outdoor advertising signs should be analyzed under the standards for dimensional variances set forth by the Pennsylvania Supreme Court in Hertzberg v. Zoning Board of Adjustment, 21 A.2d 43 (Pa., 1998).

3. Whether the Zoning Board properly granted Appellant variances to erect outdoor advertising signs where substantial evidence supported the Board's findings that if the variances were denied Appellant would suffer an unnecessary hardship that was not created by Appellant and that the variances would not adversely affect public health, safety and welfare. (A278, A279)

The first two issues were not raised below in the Common Pleas Court since the Petitioner had not filed a cross appeal.

Further, these issues are different than the issues being framed in the present Petition for Writ of Certiorari.

1. Is the enforcement of a zoning classification that is erroneous on its face a violation of due process and taking clauses of the United State Constitution?

2. Under the due process and taking clauses of the United State Constitution, should the burden for obtaining a dimensional variance be different from and lower than the burden for obtaining a use variance?

These issues were not raised on any cross appeal by the Petitioner in the Court of Common Pleas of Philadelphia County. They also are different from the issues framed in the Commonwealth Court by the Petitioner.

This Honorable Court should deny the present Petition for Writ of Certiorari since the issues were not properly presented in the Courts below and were therefore waived.

Conclusion

The Respondents, SCRUB, et al., respectfully requests the Petition for Writ of Certiorari be denied since the issues were waived by not timely or properly raising the issues in the lower courts.

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